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No. ~

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

Kenneth Hastings, Petitioner

v.

United States, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Where the district court uncovers a pattern of governmental misconduct and bad faith which interferes with Speedy Trial Act administration and with the administration of justice, may the misconduct and bad faith be considered under 18 U.S.C. §3162(a)(2) for purposes of deciding the appropriate type of dismissal, absent proof that the misconduct actually caused the Speedy Trial Act violation which triggered the §3162 (a)(2) consideration?

2. Where the court of appeals altered facts, imposed a new substantive rule and substituted its own balancing of opposing factors under 18 U.S.C. §3162(a)(2), did the court of appeals exceed its proper function and act incorrectly by reversing the dismissal with prejudice under the Speedy Trial Act in the instant case?

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

Kenneth Hastings, Petitioner

v.

United States, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioner Kenneth Hastings respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on May 17, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 874 F.2d 920, and is reprinted in the appendix

hereto, p. 1a, infra.

The memorandum decision of the United States District Court of Massachusetts entered March 10, 1987 is not reported. It is reprinted in the appendix hereto, p. 51a, infra.

The Memorandum and Order of the United States District Court of Massachusetts entered July 22, 1987 has not been reported. It is reprinted in the appendix hereto, p. 78a, infra.

JURISDICTION

The United States Court of Appeals for the First Circuit issued its judgment and opinion in this case on May 17, 1988, reversing a decision of the district court. A petition for rehearing was denied on June 21, 1988. Review of the judgment by writ of certiorari is sought pursuant to 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

18 U.S.C. §3161 et seq. The Speedy Trial Act. The relevant portions are set forth in the appendix hereto, p. 107a, infra.

Local Rule 42, U.S.D.C. effective July 1, 1986. This rule is set forth in the appendix hereto, p. 112 a, infra. It is identical in all material respects to a standing order of the U.S.D.C. in effect since 1974.

Statement of the Case

The petitioner Kenneth Hastings was arrested on November 20, 1986 on federal drug charges and detained pretrial without right to bail, pursuant to 18 U.S.C. §3142(e). He was indicted on December 17, 1986. Trial was originally set for February 23, 1987 before Chief Judge Freedman. The judge had a scheduled vacation for the week of February 23rd. On

February 20th, the preceding Friday, the government moved for a two week continuance on grounds independent of and unrelated to the judge's scheduled absence. The 70 day speedy trial clock ran out on February 25, 1987. Trial did not begin until March 4, 1987. On that date, after jury selection, the judge suspended the trial and heard defendant's motion to dismiss based on Speedy Trial Act violations.

On March 6, 1987, the judge dismissed the pending indictment on Speedy Trial Act grounds and issued an opinion. [51a].

In reaching this decision, the judge ruled that the 70 day period under the Speedy Trial Act had been exceeded prior to trial. The government argued that its own motion for a two-week continuance filed February 20, 1987 tolled the clock, and therefore no violation had occurred. The grounds for the government's motion had been simply that the parties were still

negotiating. The prosecutor claimed that he had no knowledge, prior to February 20th, that the judge was scheduled to be absent on the date trial was originally set. In rejecting the government's argument, the judge found that on February 2, 1987 he had personally informed the prosecutor of his planned absence. The judge found that Hastings had filed no motions or taken any other action to toll the speedy trial clock. The judge ruled that the 70 day period under the Speedy Trial Act had been exceeded prior to trial.

The judge then considered the seriousness of the offenses charged, the short delay, and the circumstances leading to the delay, and the effect of reprosecution. Relying on the apparent lack of bad faith by the government, the judge concluded that dismissal without prejudice was appropriate. He entered an

order of dismissal without prejudice on March 6, 1987 and issued his written opinion on March 10, 1987.

From November 20, 1986 to March 6, 1987, Hastings had been held in jail solely to await trial in this case. The court ordered Hastings' release on March 6, 1987. On that date, the prosecutor filed a new complaint and obtained a warrant for Hastings' arrest. Hastings voluntarily surrendered himself on March 9, 1987 after being informed that a new arrest warrant had been issued. He was reindicted on March 11, 1987. The new indictment contained one additional count, related to the same time period as the original indictments. Hastings was released on bail after arraignment.

At a Magistrate's hearing on March 12, 1987, the prosecutor asserted that the government had already completed its discovery obligations during the pendency

of the first indictment. During the first indictment, the prosecution had sent Hastings a written statement on December 19, 1986 in response to a standing court order and Local Rule 42 to provide automatic disclosure of "exculpatory material" and "promises, rewards and inducements to government witnesses." [112 a] The government's automatic discovery response stated that there was no exculpatory material and that "if" there were promises, rewards or inducements, those would be disclosed prior to testimony of the witnesses.

On inquiry, the magistrate determined that the government's original response failed to satisfy the automatic discovery requirements established by the Local Rule and ordered the government to provide a proper response.

On March 16, 1987, the prosecutor provided a second "automatic discovery"

response stating that the government had paid an "individual" $1,150.00 and that the individual "may receive additional funds in the future." No explanation was offered regarding the circumstances under which the payment had been made or the circumstances that would result in future payment. Hastings made an informal request of the prosecutor for such further information. This request was rejected. Hastings then filed a motion for reconsideration of the STA dismissal, and other motions.

In response to Hastings' motion for reconsideration, over a period of weeks the prosecutor made a series of excuses for noncompliance with the local automatic discovery rule, as follows:

1. He did not know that he was required to provide the discovery automatically, due to recent rule changes;

2. He considered the payment information to be "minor" impeachment

material and not subject to disclosure;

3. He knew that he was required to provide the discovery, but he and the other attorneys in his office elected not to provide it;

4. In his opinion, it did not make any substantive difference whether or not he conformed to the rules for automatic discovery;

5. If there was an attempt to enforce compliance with the rules, he could still avoid disclosure by claiming that the safety of the individual would be jeopardized thereby;

6. The policy of noncompliance that he followed was used by all the prosecutors in the office and had been for years;

7. He acknowledged that this policy in practice required defendants to file unnecessary motions.

After giving the prosecutor still further opportunities to complete automatic discovery and to suggest alternative

sanctions, the Chief Judge reconsidered his earlier decision to dismiss without prejudice.

He had originally considered each of the factors enumerated in 18 U.S.C. §3162 (a)(2). Upon reconsideration, he found that the government's policy had the effect of requiring the defendant to file unnecessary discovery motions which in turn delayed the proceedings and improperly created "excludable" time under the Act. (His opinion is sent forth on p. 78a.) He found that the information withheld from Hastings during the first indictment, and not fully disclosed during the second indictment, was important impeachment material. He found that Rule 42 had been in effect since July 1, 1986 and that an identical standing order had been in effect since 1974. He found that since the prosecutor had already provided information about this "individual", the assertion that

discovery could properly have been withheld because of alleged danger to the individual was advanced in bad faith. He found each of the prosecutor's excuses to be unsupportable or disingenuous. He found that the government acted in bad faith toward unidentified defendants as well as toward Hastings. He also found that the prosecutor acted in bad faith toward the court. He rejected the government's claim that the defendant had not been prejudiced. [92a; 101a-104a.]

After considering these and additional circumstances, the judge concluded that dismissal with prejudice was the appropriate remedy.

On July 22, 1987, the judge ordered the indictment dismissed with prejudice, 133 days after the second indictment was returned.

The government appealed. A divided panel of the First Circuit held that the

district court should not have considered the government's misconduct in its balancing of considerations under §3162(a)(2). The judgment of the district court was reversed and the case remanded for further proceedings on the second indictment. Judge Breyer dissented on the grounds that there was no clear error or abuse of discretion by the Chief Judge.

Two characteristics of the First Circuit's opinion should be described here. First, the opinion changes certain factual findings by the trial judge. Second, the First Circuit restricts the balancing consideration under §3162(a)(2) by enunciating a new rule. Both these matters are discussed below:

Altering the Facts:

The First Circuit makes three important factual assertions which alter findings made by the trial judge, as follows:

1. The First Circuit states that "the

accused suffered no cognizable harm. Hastings II, p. 14." [13a.] and "the accused was not materially prejudiced. Hastings II, p. 14." [14a.]. This was not the trial judge's finding. The trial judge stated: "Standing alone, the discovery violation has not seriously prejudiced the defendant because he has not actually been tried without the knowledge of the government's payment to the informant." (emphasis added.) [101a.] The trial court also stated that: "[T]he government's discovery approach in this case seriously prejudices a defendant's right to forego the filing of unnecessary pretrial motions and to be brought to trial within seventy days of arraignment. It undermines the effective administration of the Speedy Trial Act and the administration of justice. A defendant in pretrial detention [such as Hastings] is put in the position of having to choose between two things to

which he is clearly entitled: a speedy trial and the chance to be released from pretrial detention, and important impeachment evidence the disclosure of which is supposed to be 'routine and automatic'." [103a, 104a]

2. The First Circuit states that the connection between the governmental misconduct and bad faith and the speedy trial act is only "theoretical". [37a] The trial court, as noted above, found the connection actual: "It undermines the effective administration of the Speedy Trial Act and of justice." [103a, 104a]

3. The First Circuit states that "the trial delay beyond the temporal limit [was] due to wholly unrelated [to Speedy Trial Act] matters. Hastings II, p. 3." [13a.]

This was not the trial judge's findings. Upon reconsideration, the trial judge rejected his earlier formulation that the delay was due to "the unavailability of the

Court and the progress of plea negotiations." [81a.] Instead, he found that the "bona fides" of the prosecutor could no longer be accepted, [90a.], thereby bringing back into question the full circumstances leading to the trial delay.

In each of the above instances, the First Circuit has changed the findings of the District Court, sub silentio.

Enunciating a New Rule:

The First Circuit also enunciated a new Speedy Trial rule, as follows:

> [T]he Speedy Trial Act, as we interpret it, demands a causal nexus between [governmental] misconduct and trial delay in order to justify reliance on the former in barring reprosecution under §3162(a)(2)." [35a]

and

> "[T]he trial court should not have factored the government's gameplaying with automatic discovery into the speedy trial calculus." [40a]

and

> "[T]he pattern of discovery infractions

should not have affected the balancing demanded by the Speedy Trial Act." [45a]

It was the fact that the trial judge allowed the governmental misconduct and bad faith to affect his balancing in this case, that gave rise to "error", according to the First Circuit. [45a]

The First Circuit attempts to buttress its rule that to be considered, misconduct must have caused delay (not just any STA prejudice) by noting the presence of 18 U.S.C. §3162(b) in the statutory scheme. [38a-40a] Section 3162(b) allows for direct sanctions to be meted out directly against attorneys who interfere in the administration of the Act. [108a] The First Circuit suggests this sanction would have provided an appropriate remedy in the instant case. Since sanctions under §3162(b) would be appropriate, the First Circuit impliedly agrees with the trial judge that the governmental conduct

undermined the effective administration of the Act. The First Circuit provides no guidance about how to apply §3162(b) sanctions in view of the fact the misconduct was widespread: "We cannot tell with assurance whether this malaise [governmental misconduct] was district-wide or endemic only to cases prosecuted in the Springfield division." [10a, Ft.nt.2].

REASONS FOR GRANTING THE WRIT

1. THE FIRST CIRCUIT'S RULE THAT A PATTERN OF GOVERNMENTAL MISCONDUCT WHICH INTERFERE WITH THE ADMINISTRATION OF THE SPEEDY TRIAL ACT CANNOT BE CONSIDERED IN THE BALANCING PROCESS UNDER 18 U.S.C. §3162(a)(2), UNLESS THE MISCONDUCT CAUSED THE SPEEDY TRIAL DELAY, PRESENTS AN IMPORTANT MATTER OF STATUTORY INTERPRETATION WHICH SHOULD BE ADDRESSED BY THIS COURT.

2. THE FIRST CIRCUIT'S RULEMAKING APPROACH TO THE SPEEDY TRIAL ACT AND THE FIRST CIRCUIT'S ALTERATION OF THE TRIAL JUDGE'S FINDINGS CONFLICTS WITH A DECISION OF THIS COURT.

I

Under the First Circuit's new

substantive STA rule, district courts are prevented from considering a pattern of governmental misconduct, the very factor which in Taylor would have tipped the balance in favor of a dismissal with prejudice. United States v. Taylor, __ U.S. ___, 108 S.Ct 2413, 2421 (1988). The pattern of misconduct here is concededly one that has an adverse impact on the administration of the Act.[1] (The First Circuit suggests a sanction under 3162(b).) The First Circuit also agrees that the misconduct was wide-spread through the local U.S. Attorney's office.[2] Also

---

[1] See, 18 U.S.C. §3162(a)(2) at 108, 109a, infra. One of the specifically enumerated factors in that section is "the impact of reprosecution on the administration of this chapter."

[2] The fact that it was difficult to tell how wide spread the misconduct was suggests that §3162(b) sanctions would not have been adequate to deal with the problem. See, U.S. v. Hastings, 461 U.S. 499, n.5, 506 (where sanctions were appropriate.)

conceded were the prosecutor's attempts to hide the misconduct from the Court.

Moreover, the First Circuit makes no challenge to the trial judge's finding that the prosecutor's "bona fides" could no longer be accepted or that the prosecutor acted in bad faith or that he was disingenuous. There is no challenge to the judge's findings that Hastings was prejudiced by being incarcerated pre-trial, including for the period of STA delay, and that as a result of the government's misconduct he was forced to choose between his rights to a speedy trial and important impeachment material to which he was automatically entitled prior to trial. See, Local Rule 42, [112a], U.S. v. Bagley, 473 U.S. 667, 676 (1985) (impeachment evidence came within the Brady rule); U.S. v. Henderson, __ U.S. ___ 106 S.Ct. 1871, 1876, 1877 (1986) (all motions which require hearing toll the STA clock.) There

was no challenge to the fact that a substantial period of delay during the second indictment was directly attributable to the government's improper discovery policy.

Nonetheless, the First Circuit has decided that some amount of prejudice must result from the government's misconduct, if it is to be factored in, and that the prejudice must be in the form of delay beyond the temporal limits of the Act. The First Circuit claims support for the proposition that some prejudice is necessary from this Court's holding in United States v. Hastings, 461 U.S. 499, 506-507 (1983). [34a]

In United States v. Hastings, 461, U.S. 499, 506, the Court held that in exercising general supervisory powers, a conviction could not be overturned because of prosecutorial misconduct if the error was "harmless". The First Circuit relies on

Hastings as support for its rule that prejudice is necessary in the present case [34a]. However, in STA cases there is no opportunity to review the entire record, post hoc, in order to determine whether the error was harmless. Unless, district courts dismiss without prejudice and wait for a subsequent indictment and conviction, there would be no opportunity to review the error on the basis of the harmless-error doctrine.

There are different values served in statutorily created STA dismissal and in dismissals after conviction under general supervisory powers. Id. 461 U.S. 506. In STA cases, dismissal with prejudice does not require a finding of prejudice to the defendant. Taylor, 108 S.Ct. 2413, 2418. Therefore, the First Circuit's reliance on Hastings is inappropriate and illustrates the First Circuit's misguided attempt to find a rule which would systematically

limit the use of dismissal with prejudice as a STA remedy.

II

An additional problem with the First Circuit's rule is that is ignores the special problems of proof created when the government is acting in bad faith. For example, in the instant case, it is difficult to know whether or not the government's misconduct had any "causal nexus" with the STA delay. At first it appeared that the delay was occasioned simply by the absence of the trial judge. The facts that the prosecutor apparently lied about not knowing that the judge would be absent, and that he filed a spurious motion for a two-week continuance, originally had no special significance. However, in light of the government's policy to hide their non-disclosure of impeachment materials, it appears that the

government may have intentionally decided not to advance the trial date, request a different trial judge, or take some other action to move for trial within the STA deadline. Since the government and the defendant were then negotiating, the government may have decided to postpone trial in the expectation those negotiations would conclude in a guilty plea without the disclosure of the impeachment materials. In his opinion the trial judge states:

> [I]f the Court had not dismissed the original indictment for Speedy Trial grounds and had the defendant pleaded guilty (as everyone was expecting) without ever knowing of the payment to the confidential informant, a serious miscarriage of justice would have occurred. [101a n.3.]

Given the bad faith of the government, proving the "causal nexus" may be difficult, and the district court did not expressly undertake to make such express findings. However, if the "causal nexus" rule were allowed to stand, the district court should have the opportunity to make

findings. Not to give the judge this opportunity, would create a preference for dismissals without prejudice. See, U.S. v. Taylor, 108 S.Ct. 2413, 2418. (Congress did not intend any particular type of dismissal to serve as the presumptive remedy for a Speedy Trial Act violation.) See, Albermarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975); U.S. v. Pringle, 751 F.2d 419, 436 (1984) (where cases were remanded for further findings.)

III

For this and other reasons, the First Circuit's rule and its approach to review of the district court's decision appears contrary to the procedural approach for appellate review articulated in United States v. Taylor, ____ U.S. ____, 108 S.Ct. 2413 (1988).

The Taylor decision makes clear that there are no substantive rules for interpreting the STA other than the Act

itself.

In his dissent, Judge Breyer states: "If we concede the misconduct is relevant to the reprosecution decision, I do not see how we can say the district court made a clear error of judgment." [49a] Judge Breyer's analysis is consistent with the analysis in Taylor.

IV

The Taylor case provides numerous points of factual comparison with the instant case:

1. In Taylor, it was the defendant who contributed to trial delay. In the instant case the defendant did nothing to contribute to trial delay.

2. In Taylor, there was no prejudice to trial preparation. Id. 108 S.Ct. at 2422. In the instant case, the defendant went to trial without discovery.

3. In Taylor, there was no additional

restriction on the defendant's liberty, Id. 108 S.Ct. at 2422. In the instant case, the defendant was held on a detention order until the case was dismissed, ten days after the 70-day deadline expired.

4. In Taylor, there was no pattern of government misconduct or bad faith toward the defendant. Id., 108 S.Ct. at 2420, 2421. In the instant case there was both.

But more important, since all STA cases are fact-intensive, in the approach to appellate review between the two cases:

In Taylor, this Court held that some "substantive scrutiny" was necessary to ensure that the purposes of the Act were given effect. Id., 108, S.Ct. at 2420, 2419. However, this Court expressly rejected the invitation to engage in substantive "rulemaking" as a method of deciding what could or could not result in a dismissal with prejudice. Id., 108 S.Ct. at 2422 n.12. This court reversed because

it found that the district court had failed to consider the relevant factors and those it did rely upon were unsupported by findings or by the record. Id., 108 S.Ct. at 2423. However, had the statutory factors been properly considered and the supporting factual findings not clearly in error, "the judgment of how opposing considerations balance should not be lightly disturbed." Id., 108 S.Ct. at 2419, 2420. Moreover, the factual findings of the district court were entitled to "substantial deference" and would be subject to reversal only for clear error. Id., 108 S.Ct. at 2419.

In the instant case, the trial judge had made two sets of findings in which he expressly considered and weighed all the statutory factors.

The weight to be attached to opposing considerations is a matter left to the sound discretion of the trial judge. U.S.

v. Taylor, 108 S.Ct. at 2420.

The comparisons between this case and Taylor, show that the First Circuit's approach is incorrect, unless of course, the First Circuit's rule states a correct interpretation of the Act. Even if its rule were correct, however, the case may be wrongly decided because the court of appeals did not defer to the judge's factual findings. Although there may have been more than one permissible view of the evidence, the trial judge's choice "cannot be set aside." Anderson v. Bessemer City, 470 U.S. at 574, 105 S.Ct. at 1512; Amadeo v. Zant, ___ U.S. ___, 108 S.Ct. 1771, 1778 (1988).

V

Cases in other circuits also show that STA cases are fact intensive and that it is difficult to generalize profitably from case to case. In U.S. v. Kramer, 827 F.2d

1174 (8th Cir. 1987) a dismissal with prejudice was reversed where the district court failed to discuss the statutory factors. Likewise in U.S. v. Philips, 775 F.2d 1454 (11th Cir. 1985) the district court made no findings with respect to any adverse impact of reprosecution on the administration of the Act or on justice, and a dismissal with prejudice was reversed. In, U.S. v. Salgado-Hernandez, 790 F.2d 1265 (5th Cir. 1986), cert. den. ____ U.S. ____ (1986), and in U.S. v. May, 819 F.2d 531 (5th Cir. 1987) decisions to dismiss without prejudice were upheld. In the former case the court of appeals noted the availability of bail to the defendant as an indication that prejudice was doubtful on account of a nine-day delay. Id. at 1268. In the latter case, the court of appeals noted that an eleven day delay created a "very close case" where the government could not explain the

delay. Id. at 535. In none of those cases was there an issue of a pattern of governmental misconduct, and the petitioner is aware of no such STA case other than the instant case.

The fact that analysis of STA cases tends to be fact intensive, underscores the importance of there being a well-understood method for district court decision and for appellate review.

The Taylor case provided some of that guidance. But, review in Taylor occurred in a case where the district court's findings were inadequate and there was no issue of misconduct or bad faith and where the petitioner had not been held pretrial on a detention order. Accordingly, the decision did not focus on the important problems raised in the instant case.

VI

This is not simply a case where the

appellate court has substituted its balancing process under §3162(a)(2) for that of the district court. Here, the First Circuit has created a novel, dangerous and confusing precedent. It holds that the availability of §3162(b) sanctions pre-empt consideration of governmental misconduct under §3162(a)(2) unless there is evidence that the misconduct caused the very delay which triggered §3162(a)(2) considerations.

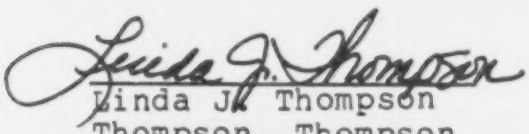
The First Circuit's rulemaking approach to STA is clearly contrary to the approach set forth in United States v. Taylor, 108 S.Ct. 2413, 2422 n.12, (where "rulemaking" was rejected). However, this Court has not addressed the particular interpretation of the Act which the First Circuit has recently articulated. Because the First Circuit's new gloss on the Act has a potentially great and adverse impact on the administration of the Act and on the

administration of justice, the general principles of the Taylor decision do not offer sufficient guidance.

CONCLUSION

For the above reasons, this petition for certiorari should be granted.

Respectfully submitted



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United States Court of Appeals
For the First Circuit

No. 87-1782

UNITED STATES OF AMERICA,
Appellant,

v.

KENNETH S. HASTINGS,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Frank H. Freedman, U.S. District Judge]

Before

Campbell, Chief Judge,

Breyer and Selya, Circuit Judges.

Patty Merkamp Stemler, Appellate Section, Criminal Division, Department of Justice, with whom Frank L. McNamara, Jr., United States Attorney, was on brief for appellant.

Linda J. Thompson with whom Myles Jacobson and Thompson, Thompson, Nagel & Jacobson were on brief for appellee.

MAY 17, 1988

SELYA, Circuit Judge. On December 17, 1986, a federal grand jury charged defendant-appellee Kenneth S. Hastings with seven counts of possession of cocaine and methamphetamine with intent to distribute and one count of possession of a firearm during commission of a felony. See 21 U.S.C. § 841(a)(1); 18 U.S.C. § 924(c). A February 23, 1987 trial date was cancelled because no judge was available. This deferral soon brought the Speedy Trial Act (Act), 18 U.S.C. §§ 3161-3174, into play. When seventy days next following indictment had elapsed without commencement of trial, Hastings moved to dismiss under 18 U.S.C. § 3162(a)(2). Finding no excludable time, the district court dismissed the charges because of the delay, as required by the Act. See id. The court decreed that the dismissal would be without prejudice. United States v. Hastings, No. 86-0419, slip op. (D. Mass. Mar. 10, 1987) (Hastings

I).[1]

The grand jury wasted little time in reindicting appellee on substantially the same charges, adding one more drug count. During arraignment, it came to light that the government had thimblerigged its discovery responses in the original case.

---

[1]The facts underlying the delay are essentially as follows. Appellant was arrested on November 20, 1986 and temporarily detained. On November 25, following a hearing, he was held pending trial. Hastings was arraigned on the date the indictment was returned (December 17, 1986). For purposes of 18 U.S.C. § 3161(c)(1), the speedy trial clock began to tick at that juncture. Trial was set for February 23, 1987 but was not held because the judge was on vacation. The prosecutor, who knew of the judge's plans, had neglected seasonably to protect the record, and the court had not entered a continuance. On March 3, Hastings moved to dismiss the indictment on speedy trial grounds (thus stopping the clock some 76 days after it started).

The district judge held a hearing on March 6, dismissed the indictment, and released Hastings from detention. Since no time between December 17, 1986 and February 25, 1987 was excludable, the Act's 70 day deadline had been exceeded by some five days.

Hastings filed a flurry of motions, including one which asked the district court to reconsider its March 10 order. Concluding in effect that revelation of the discovery violation warranted conversion of the dismissal to one "with prejudice," the court obliged. United States v. Hastings, No. 87-0058, slip op. (D. Mass. July 22, 1987) (Hastings II). Consequently, reprosecution was blocked.

The United States appeals, arguing that the breach of discovery rules was separate and apart from, and wholly unrelated to, any actual delay engendered in the course of Hastings's case -- a point on which there can be no founded dispute -- and thus, could not justify dismissal on speedy trial grounds. We agree. Although we share the district court's well-articulated indignation at the prosecution's cavalier approach to criminal discovery, we are persuaded that it was error to dismiss with

prejudice under the Act.

I

We begin our exposition with a bit of history. In 1974, the United States District Court for the District of Massachusetts adopted a "Uniform Order for Automatic Discovery in Criminal Cases." This uniform order was intended to facilitate discovery, to shorten the time spent litigating run-of-the-mill pretrial matters, and to conserve the resources of the court and the parties. One important objective was to expedite the trial process. Prior to Hastings's first indictment, the basic features of the uniform order were translated into a local rule of court, which provided in pertinent part:

> In all criminal cases, the following material and information in the possession, custody or control of the parties, the existence of which is known, or by the exercise of due

> diligence may become known, to the attorneys for the parties, shall be disclosed to the opposing party.
>
> Such disclosure will be routine and automatic, i.e., without any court order in the particular case. It should occur as soon as counsels' trial engagements permit and in all events without fourteen (14) days after arraignment.
>
> (a) The Government shall disclose, and allow the defendant to inspect, copy and photograph, all written material as follows:
>
> * * *
>
> (7) If any promises, rewards, or inducements have been given to any witnesses, a written statement of such promises, rewards or inducements

D. Mass. Loc. R. 42.

Despite the fact (now conceded) that an informant was paid and told he might receive further payments, the monition of Local Rule 42 failed to spark the

prosecution's interest in Hastings's case. Neither the local rule nor the uniform order nor the entry of the latter in the case docket made much of an impression upon the United States Attorney's office (USAO). During the currency of the original indictment, the USAO deigned to furnish Hastings only the following information on the subject:

> Pursuant to the Uniform Order for Automatic Discovery issued by the Court in the above matter on December 17, 1986, the government provides you with the following:
>
> * * *
>
> 9. If any promises, rewards of inducements have been given to any witness that the government intends to call as a witness during trial of this case, you will be advised of same prior to the testimony of that witness.

For reasons which defy logical explanation, defendant did not immediately object to

this response, nor did he file a motion or otherwise bring the nonanswer to the court's attention. When the court dismissed the indictment without prejudice because the speedy trial period had run, it was unaware of the government's high-handed tactic.

During arraignment on the new indictment, however, the balloon went up. The magistrate inquired whether the government has provided "automatic" discovery. When the prosecutor replied in the affirmative, defense counsel pointed out that the disclosure was patently inadequate as to promises, rewards, and inducements. It took the magistrate little time to see that this was so. He directed the government to obey Local Rule 42 and supply meaningful discovery. The rejoinder was less than fully informative. In relevant part, the USAO stated:

(4) Records [sic] and Inducements

> The individual who assisted the government during its investigation of the defendant received $1,150.00. The Drug Enforcement Administration has also informed said individual that it may receive additional funds in the future. No other promises, records [sic] or inducements are known to have been provided.

Deeming this response too vague and uncertain, defendant sought further "automatic" discovery under the local rule. The prosecutor balked, refusing to supplement the reply without a court order requiring him to do so. It was at this juncture that Hastings simultaneously brought the motion for reconsideration of the dismissal and a flock of other motions, including a motion to compel the additional discovery, a motion to dismiss the second indictment, and a motion for sanctions.

While these motions were under

advisement, the plot thickened. After digging through several layers of lame prosecutorial excuses, it became all too clear that the government's reluctance freely to furnish automatic discovery materials was chronic. The nonanswer spun to Hastings, it turned out, was the standard response provided by the USAO in criminal cases.[2] This had the effect of standing the local rule on its head. The follow-on response could plausibly be viewed as a second link in the same rusty chain; there was evidence that the USAO, after being forced to admit that a rewarded informant was involved, routinely attempted to keep the informant's identity from the

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[2]We cannot tell with assurance whether this malaise was district-wide or endemic only to cases prosecuted in the Springfield division. How widespread the practice may have been would not, however, affect our present inquiry; even if only the Springfield sitting was implicated, that was quite plainly one sitting too many.

defense (whether or not there was any sound basis for claiming such confidentiality). In short, although "automatic" discovery was contemplated, the USAO admitted that it deliberately shifted the balance and placed the onus on the accused to take action (say, by moving for a court order) in order to obtain information which he was entitled to receive as of right.

Once this sorry state of affairs had been dragged into the sunlight, the district court acted. It treated the USAO's machinations as comprising a speedy trial problem, reasoning that subversion of Local Rule 42 could well result in trial delays. A defendant denied automatic discovery in this fashion would be placed snugly between a rock and a hard place: he could either forgo discovery to which he was entitled or he could file a motion to obtain it, thus stopping the speedy trial clock and easing the pressure of the

government to bring him to trial.[3] By forcing the accused to open a window of prosecutorial opportunity for excludable delay, the USAO's routine evasion of Local Rule 42, in theory, could effectively circumvent the Act's time limitations. And such a practice would be particularly invidious with respect to a defendant who,

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[3] Inter alia, the Act stipulates:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant including but not limited to --
>
> * * *
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition, of such motion; . . .

18 U.S.C. § 3161(h)(1)(F).

like Hastings, was being detained pending trial.

The district court acknowledged that because Hastings had not taken the bait -- defense counsel abjured the filing of any motions in respect to discovery -- the government's gamesmanship had not gained it any time in this case. Rather, trial was delayed beyond the temporal limit due to wholly unrelated matters. Hastings II, slip op. at 3. The court observed that the violation of Local Rule 42 alone would not warrant dismissal of the indictment with prejudice, id. at 14, and that the accused had suffered no cognizable harm. Id. Nonetheless, the court revised its earlier finding of the USAO's good faith, and concluded that the Act and the administration of justice had been undercut. The district judge rightfully excoriated the government's conduct and stated unequivocally that he would have

dismissed the original indictment with prejudice had he known the entire story. Id. at 16. Noting the systemic threat which the USAO's repeated use of vulpine discovery tactics posed, the court rectified its earlier "mistake" by barring reprosecution. Id. at 16 - 17.

II

The Act represents a point at which a variety of interest converge. For somewhat different reasons, perhaps, society, the prosecution, the accused, and the courts as an institution have a shared stake in bringing criminal charges to the bar of justice as promptly as practicable. The defendant's interest in a speedy trial is well documented.[4] The Act, which enhances and protects this private interest, was

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[4] Indeed, an accused's right to be tried without undue delay is of constitutional dimension. See U.S. Const., amend. VI (footnote continued)

designed simultaneously to serve a broader range of concerns. For one thing, the public has a stake in prompt trials. This flows in part from society's general interest in resolving the guilt or innocence of those accused of crime rapidly (consistent with fundamental fairness) and punishing those found to be guilty. See Barker v. Wingo, 407 U.S. 514, 522 n.16 (1972) (public has an "interest in trying people accused of a crime rather than granting them immunization because of legal error") (citation omitted). In more senses than one, justice delayed is justice denied.

There are other reasons, too, which undergird the public interest:

(Footnote continued)

("accused shall enjoy the right to a speedy and public trial"); Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (describing the right to speedy trial as "fundamental"). The Act increases a defendant's speedy trial safeguards beyond the constitutional minima.

> A speedy trial is necessary to preserve the means of proving the charge, to maximize the deterrent effect of the prosecution and conviction, and to avoid, in some cases, an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses.

A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 12 (1980) (Partridge)(citation omitted). Accord United States v. Caparella , 716 F.2d 976, 981 (2nd Cir. 1983). In a nutshell, then, the Act promulgates a temporal framework which is thought to advance both the public and private interests in the fair -- but expeditious -- trial of criminal cases.

The linchpin of the Speedy Trial Act is a provision requiring that an accused be brought to trial within seventy days after indictment, information, or first appearance before the court. 18 U.S.C. § 3161(c)(1). If trial does not commence within the speedy trial period, as enlarged

by certain excludable intervals, see 18 U.S.C. §3161(h), and the defendant so moves, the court must order dismissal. 18 U.S.C. §3162(a)(2). Nevertheless, the judge has discretion to decide whether reprosecution will be barred. United States v. Brown, 770 F.2d 241, 242-43 (1st Cir. 1985), cert. denied, 474 U.S. 1064 (1986). In considering the question, he must start from a level playing field; there is no presumption either way. Id. at 243-44.

The Act identifies three elements that must be considered "among others" in deciding whether to dismiss with or without prejudice: the gravity of the charged crimes; the circumstances leading to dismissal; and the impact of reprosecution vel non on the administration of justice and of the Act. See 18 U.S.C. § 3162(a)(2). This construct was intended as a compromise, gleaned from many sources and

addressed to diverse constituencies. See generally Partridge, supra, at 197-218. We are satisfied, based on the historical record, that the three-pronged test was crafted to encourage judges to weigh both private and public interests when determining whether or not to foreclose reprosecution. See Caparella, 716 F.2d at 978-81 (analyzing legislative history). The omnibus clause of section 3162(a)(2), of course, allows a court to widen the lens of inquiry, but only slightly. Any extraneous matters to be considered must be rationally related to the balancing objectives of the tripartite test. Thus, a district court may factor into the Act's calculus, for example, items such as the length of the delay and the prejudice to the defendant stemming from the violation (or conversely, the absence of prejudice). See Brown, 770 F.2d at 245. Accord United States v. Bittle, 699 F.2d 1201, 1208 (D.C.

Cir. 1983). The approach, ultimately, is discretionary, permitting the trial judge to examine a variety of serviceable fabrics and measurements, and custom-tailor an order of dismissal to suit the exigencies and equities of a particular case.

It is apodictic that the court's discretion in synthesizing these items, while broad, is not unlimited. "An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment." United States v. Kramer, 827 F.2d 1174, 1179 (8th Cir. 1987). As we have said before, "discretion, as the term implies, necessarily speaks to degrees, not to absolutes." Aggarwal v. Ponce School of

Medicine, 745 F.2d 723, 726 (1st Cir. 1984).

Given this tablesetting, we turn to the bill of fare.

III

The United States does not seriously contest the propriety of casting aside the original indictment. The plain fact is that trial did not start within the statutory period. See supra note 1. The question, therefore, is whether ordering the dismissal to operate with prejudice was supportable. In our attempt to answer this query, we explore the pertinent criteria to ascertain if there was sufficient room for the court, in the sound exercise of its (not illimitable) discretion, to foreclose all future prosecution. In the idiocratic circumstances of this case, the analysis, as we shall see, ineluctably reduces to the critical issue of whether the USAO's manhandling of the automatic discovery principle had a relevant nexus to the

speedy trial gaffe and could properly be used as a stanchion supporting dismissal with prejudice.

A. Offense Severity. Hastings was indicted on a potpourri of drug and weapons charges. As the district court noted, he "was alleged to have been in possession of significant amounts of controlled substances on four occasions." Hastings I, slip op. at 11. More ominously still, he was "armed with a concealed semiautomatic pistol loaded with live ammunition . . . ." Id. at 11-12. The district court found the charged crimes "extremely serious." Id. at 12. The characterization, we think, is unassailable.

This aspect of the test centers primarily on society's interest in bringing the particular accused to trial. The graver the crimes, the greater the insult to societal interests if the charges are dropped, once and for all, without a

meaningful determination of guilt or innocence. It is impossible to deny the heightened public interest in adjudicating felonies of this sort on the merits. By their very nature, drugs-for-profit offenses are extremely serious. The presence of several such charges in this case, therefore, militates strongly against dismissal with prejudice. See United States v. May, 819 F.2d 531, 534 n.15 (5th Cir. 1987)(collecting representative cases); United States v. Simmons, 786 F.2d 479, 485 (2nd Cir. 1986)(drug charge involving "relatively small quantity of heroin" serious within meaning of section 3162); Brown, 770 F.2d at 244 (offenses involving four ounces of cocaine "undeniably serious"). The firearms charge, of course, lent added gravity to an already somber situation. The severity prong points directly toward dismissal without prejudice.

B. The Road to Dismissal. Next, we scrutinize the circumstances which gave rise to the speedy trial violation. This aspect of the test focuses on the culpability of the delay-producing conduct. The pendulum swings in two directions: sometimes the defendant may be to blame; other times, the government. This appeal involves no delay-producing actions attributable to Hastings, so we need not explore that path. Where, as here, the delay-causing conduct is attributable to the sovereign (the court or the prosecutor), it inveighs progressively in favor of the accused. As we see it, the appropriateness of barring reprosecution increases in relatively direct proportion to the degree of culpability which attaches. Accordingly, delay which results either from intentional noncompliance with the Act or from actions designed to gain unfair prosecutorial advantage weighs

heavily in favor of dismissal with prejudice. See United States v. Kramer, 827 F.2d at 1177; United States v. Simmons, 786 F.2d at 485-86.

Closely allied to such examples, but perhaps once removed, are recurrent shortcomings. If delay is occasioned by a pattern of governmental inattention or because the prosecutor, like a recalcitrant schoolboy, fails to learn oft-repeated lessons, the situation becomes more conducive to dismissal with prejudice than if delay stems from some solitary bevue. See United States v. Salgado Hernandez, 790 F.2d 1265, 1268 (5th Cir.) (if prosecution "regularly or frequently fails to meet the Act's time limits," court may properly take that into consideration), cert. denied, 107 S.Ct. 463 (1986); Kramer, 827 F.2d at 1177 (same). At yet a further remove are cases like this one, where an isolated instance of administrative oversight was the root

cause of the trial delay. Random negligence while not to be condoned, is less blameworthy than purposeful misconduct or recurrent transgressions, and weighs less heavily in favor of banning reprosecution.

This case could well have been draped in the blackest of shrouds: the government's willful failure to provide automatic discovery could have required deferral of trial under easily envisionable circumstances. Yet, such a contingency never came to pass. Despite the downside potential, the actual delay was wholly unrelated to the discovery violation. As the district court found, the prophylaxis of the Act had been riven by "the unavailability of the Court and the progress of plea negotiations." Hastings II, slip op. at 3. No evidence was presented to show that the USAO's benighted discovery policy affected the course of

this case or that it chronically, frequently, or even occasionally caused trials to stray beyond the perimeters of the Act. Nor was there any demonstration that a time had come when the practice had actually (as opposed to theoretically) threatened to lead to that result.[5] In sum, the situation at bar was one where the government had failed but once -- and for reasons not attributable to prosecutorial misconduct -- to meet the speedy trial deadline. Whatever misguided discovery practices the USAO might have condoned, it was nothing more than oversight and lack of judgepower which caused the delay, and hence the dismissal, in Hastings's case.

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[5] At the hearing in district court, the government admitted that the USAO's standard procedure was to throw sand in the gears of automatic discovery in the manner which we have described. But no evidence was adduced of even a single instance where the praxis, disreputable though it was, led to a violation of the Act or to actual prolongation of the pendency (untried) of an indictment.

We do not shrug off such matters. Neglecting to heed established time limitations and lack of attention in their observation are wrong -- perhaps doubly so when laid at the government's doorstep in a criminal case. But circumstances of this sort, standing alone, do not warrant dismissal with prejudice of serious criminal charges. See United States v. Melguizo, 824 F.2d 370, 372 (8th Cir. 1987) (administrative neglect on part of USAO not sufficient to justify barring reprosecution for serious offense), pet. for cert. filed, 56 U.S.L.W. 3371 (Oct. 3, 1987) (No. 87-551); United States v. May, 819 F.2d at 534 & n.12 (negligence -- as opposed to intentional foot-dragging -- weighs in favor of dismissal without prejudice); United States v. Bittle, 699 F.2d at 1208 (similar); cf. United States v. Caparella, 716 F.2d at 980-82 (oversight and administrative negligence may justify

dismissal with prejudice if offense not serious).

As with the first, the second prong of the test points toward dismissal without prejudice.

C. Impact of Reprosecution. As we noted earlier, the right to a speedy trial is significant as much for the protection it confers upon society's interest in bringing criminals promptly to the bar of justice as for the protection it confers upon those accused of crime. This furculum of the section 3162(a)(2) trilogy is itself divided into two parts. The first tine -- impact on the administration of justice -- presents the court with the opportunity to consider the practical consequences of allowing or barring reprosecution, and to place generalized public and private interests onto the scales, in broad perspective. The second tine -- impact on the administration of the Act -- provides

the same opportunities, but in a narrower focus: the specific goal of assuring speedy trials. We address both aspects.

1. Administration of Justice

In this case, we believe that the first tine of the third prong comforts the appellant. We recognize that whenever government -- for whatever reasons -- falls short of meeting the Act's requirements, the administration of justice is adversely affected. Nevertheless, Congress deliberately eschewed creating a presumption favoring dismissal with prejudice for each and every violation of the Act. And in the absence of a per se rule, we find no basis for concluding on these facts -- serious criminal deportment, a tiny delay attributable to an administrative snafu, and no special prejudice (see infra Part III(D)) -- that reprosecution would countervail the administration of justice.

Although an argument can be made that the administration of justice, generally, would be well served by quashing this prosecution and thereby teaching the government a deserved lesson, that is not a part of the balancing the Act contemplates. The key is that the "lesson plan" which the accused seeks to advance relates not to speedy trials, but to the avoidance of shabby discovery practices. That is to say, the misconduct of which the USAO appears guilty -- flouting the automatic discovery principle and in that way handing defendants the short end of the stick -- was entirely separate and apart from the actual delay. It did not cause the speedy trial overrun in this case (or, for that matter, in any other identified case).

The absence of any causative link between the government's truly blameworthy behavior and the speedy trial infraction

is, we think, supremely important. The Act, after all, is a sentry designed to guard a particular set of gates; it cannot be transformed into a knight errant, riding across the landscape to do battle with evils essentially unrelated to the speedy trial paradigm. The caselaw, as we read it, is in accord. See United States v. Phillips, 775 F.2d 1454, 1456 n.2 (11th Cir. 1985)(where government's discovery delinquencies not causally connected to speedy trial violations, they cannot be counted against prosecution in section 3162 balancing). See also United States v. Kramer, 827 F.2d at 1178 (approving Phillips causal connection rationale); cf. United States v. Hoffman, 832 F.2d 1299, 1303-04 (1st Cir. 1987)(witness intimidation attributable to prosecutor will not support sixth amendment claim unless it has caused loss or erosion of material testimony).

Hastings argues, in effect, that the pattern of discovery violations permitted an imputation of bad faith in the precincts patrolled by the Act. [6] The proposition, at one and the same time, proves too much and too little. It proves too much because, if true, then every speedy trial overrun would require searching the case record as a whole to ascertain whether some different and unrelated misconduct formed a surface from which bad faith could

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[6] The Ninth Circuit has recently held that bad faith and a "lackadaisical" attitude justifies dismissal with prejudice, notwithstanding that the crime is serious and the delay inconsequential. See United States v. Taylor, 821 F.2d 1377, 1385 & n.11 (9th Cir. 1987), cert granted, 108 S. Ct. 747 (1988). We disagree with this kind of categoric approach to the matter. Such a holding necessarily fails to place seriousness of the crime and length of delay into the balance as intended by the Act. Even where bad faith has a causal nexus to actual trial delay and therefore becomes a factor which can enter into the balance, a trial court must also consider the other factors stipulated in the Act. See United States v. Fountain, 840 F.2d 509 (7th Cir. 1988).

ricochet. In that event, the Speedy Trial Act would become an all-encompassing code of ethical conduct for prosecutors -- an idea far more grandiose than Congress planned. On the other hand, Hastings's suggestion proves too little because, if true, it overlooks the absence of the necessary cause-and-effect nexus. To accept it would require that we abandon wonted notions of causation and statutory interpretation, and loose some strange and capricious beast to roam through criminal courtrooms.

There is a further reason, too, which counsels persuasively in favor of a causal connection requirement. To take punitive action addressed to misconduct causally unrelated to any actual speedy trial infraction would be tantamount to sanctioning dismissal of cases for prosecutorial misconduct. That is a rocky road to travel where, as here, no harm has

befallen defendant in consequence of the improper acts. See United States v. Hasting, 461 U.S. 499, 506-07 (1983) (supervisory powers may not be invoked to vacate conviction where prosecutor's behavior, though reprehensible, was harmless); United States v. Blue, 384 U.S. 251, 255 (1966) (though evidence obtained in derogation of fifth amendment, indictment should not be dismissed as a sanction); United States v. Ramos Algarin, 584 F.2d 562, 565 (1st Cir. 1978) ("government misconduct does not warrant reversal if it is harmless"); but see United States v. Ballivian, 819 F.2d 266, 267 (11th Cir. 1987)(per curiam)(substantial threat of prejudice or "pattern of widespread and continuous misconduct" may justify dismissal). This rocky road is a road which we believe to be closed on this appeal because the Speedy Trial Act, as we interpret it, demands a

causal nexus between misconduct and trial delay in order to justify reliance on the former in barring reprosecution under section 3162(a)(2).

Leaving aside the question of whether the case could arguably be dismissed for prosecutorial misconduct as such -- a question as to which we take no view -- the "administration of justice" furnishes no basis to predicate dismissal under the Act on the prosecutor's chronic abuse of the automatic discovery rules.

2. Administration of the Speedy Trial Act

It is in considering the second aspect of the third prong, however, that Hastings's plea takes on its most seductive light. In certain factual situations the USAO's discovery policy, as a theoretical matter, might well force an accused to choose between a speedy trial and obtaining important impeachment information. If an impermissible delay resulted from such

shenanigans, dismissal with prejudice would probably conduce to the due administration of the statute. By entering such an order, the court would sound a tocsin: the judicial system will not tolerate willful, dilatory conduct which results in crossing the Act's well-marked frontiers into forbidden territory. Without question, a delay caused in such an intolerable way offends both the public and private interests in speedy trials. But the short answer to these perorations is that the worst-case scenario is not Hastings's case and does not reflect his predicament. Here, the prosecution's conduct, vile though it may have been, did not result in, or even contribute to, postponement of the trial. The delay was, as we have said before, attributable to administrative neglect.

Even where no delay has been recorded, the potential harm inherent in the USAO's

policy is of major concern.[7] On this basis, Hastings succeeded in persuading the district court that a message should be sent. Yet theoretical prejudice alone is, we think too fragile a reed to support "with prejudice" dismissal -- at least where the charges are grave and the delay fribbling. The absence of the actual harm -- of an authentic delay attributable to the government's misconduct -- undercuts the trial judge's authority properly to send this particular message under the aegis of the Act.[8]

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[7] We note for the record that the district court eventually received assurances that the USAO's practices had been revised. While this may be of some small consolation, it does not excuse what went before.

[8] We agree fully with the district court that it would have been an intolerable travesty had the defendant pled guilty before learning about the rewards and inducements evidence which the government possessed. Hastings II, slip op. at 14-15 n.3. But notwithstanding the parade of horribles that could have developed, none did. The travesty did not occur.

It is important, we believe, that the Act provides a set of defined sanctions to be employed where counsel for either side plays an outlaw game.[9] It is noteworthy that such sanctions can be levied whether or not a violation of the Act's time limits

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[9] 18 U.S.C. § 3162(b) provides in material part:

> In any case in which counsel for the defendant or the attorney for the Government ... (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit....(4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney as follows:
>
> * * *
>
> (C) by imposing on any attorney for the Government a fine of not to exceed $250.
>
> (D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or
>
> (E) by filing a report with an appropriate disciplinary committee.

has occurred. The presence of these remedies erodes the force of appellee's argument. Cf. United States v. Hasting, 461 U.S. at 506 n.5 (discussing deterrence of prosecutorial misconduct by means short of dismissing charges). Unlike outright dismissal with prejudice, the alternate available means are sculpted to permit the court to safeguard the process and to vindicate judicial authority, while at the same time allowing both the defendant's rights and the public's interest in having guilt (or innocence) resolved to be respected. Congress afforded the courts a way to take effective action while at the same time retaining the baby -- instead of throwing him out with the bath water. Having been provided an avenue to punish misdeeds which threaten -- but do not cause violations of -- the Speedy Trial Act, there is much less need for the judiciary to stretch the statutory dismissal test in

a misshapen endeavor to contain such abuses.

For these reasons, we conclude that, in examining the effect of alternate modes of dismissal on the administration of the Act, the trial court should not have factored the government's gameplaying with automatic discovery into the speedy trial calculus. As in United States v. Kramer, this is a situation where "[d]ismissal with prejudice ... lacks any prophylactic effect as this is not a case where the court needs to deter repetition of prosecution actions which led to ... violations of the Act, since none did." 827 F2d at 1178.

Like the other prongs of the test, then, the third prong -- in both its aspects -- points toward a dismissal which will permit reprosecution.

D. Miscellaneous Factors. Before leaving the subject, we look to see if any factors cognizable under the omnibus clause of 18 U.S.C. §3162(a)(2) sway the result. Here,

two additional items -- the extent of actual prejudice and the length of the delay -- merit attention. These elements are virtually self-explanatory. The greater the prejudice to a particular defendant in consequence of a particular delay, the greater the justification for barring reprosecution. The length of the delay can be seen as a closely aligned factor: stretching delay to greater and greater extents tends ineluctably to provoke prejudice. Witnesses move or perish, memories grow dim, defense costs escalate, and the bottomless resources of the prosecution can be brought ever-increasingly to bear. To some extent, then a lengthy delay can be seen as a proxy for direct proof of actual prejudice. But in this case, neither criterion suggests dismissal with prejudice.

Hastings has made no credible argument that he was actually prejudiced by the five

day overrun. One reason, of course, is that so brief a delay is unlikely to -- and in this case did not -- materially hamper a defendant. There was no hint of lost evidence or hindrance stemming from cancellation of the planned trial. To be sure, any delay may prolong pretrial detention and postpone (even ever so slightly) defendant's chance to clear his name. But in this case, as in United States v. Salgado-Hernandez, 790 F.2d at 1269, "the harm was minimal." The district court's finding that the accused was not materially prejudiced, Hastings II, slip op. at 14, cannot be faulted.

So, too, the proxy for actual prejudice. The better-reasoned caselaw indicates that, when the charged crimes are serious, only an equally serious delay can justify dismissal with prejudice. United States v. Salgado Hernandez, 790 F.2d at 1268; United States v. Simmons, 786 F.2d at

485; United States v. Phillips, 775 F.2d at 1455-56; but cf. United States v. Taylor, 821 F.2d at 1385-86. The time limit was exceeded by five days in this case. See supra note 1. Other concerns would have to militate very strongly against reprosecution before such a brief holdup could justify dousing serious charges forever. Compare United States v. Brown, 770 F.2d at 244 (thirty-five day delay does not warrant "with prejudice" dismissal where crime serious) with United States v. Russo, 741 F.2d 1264, 1267 (11th Cir. 1984) (delay of several months sufficient to bar reprosecution even though crime serious). In fine, the miscellaneous considerations (brevity of delay and absence of cognizable prejudice), like the three main prongs of the test, incline in the government's favor.

IV

We sum up briefly. All of the factors which could properly be scrutinized under

the Act bespeak allowing charges to be reinstituted against Hastings. In ruling on the defense's initial motion, the district court weighed those factors -- appropriately, we think -- and ordered the dismissal to operate without prejudice. See Hastings I, slip op. at 11-14. It found specifically that reprosecution "would not have serious [adverse] effects on the administration of the [Speedy Trial] Act or on the administration of justice...." Id. at 13. The only circumstance that changed between the time of that ruling and the filing of the reconsideration motion was the revelation of the discovery violations. Yet, nothing which the USAO did (or neglected to do) during the course of pretrial discovery meaningfully augmented the inquiry mandated by the Act. The record admits of no causative link between the misconduct and the failure of a speedy trial in this or

any other actual case. Therefore, the pattern of discovery infractions should not have affected the balancing demanded by the Speedy Trial Act. It follows inexorably that the district court erred in commingling its well-warranted distaste for the USAO's tactics -- tactics which did not contribute one whit to the speedy trial overrun -- with the elements suitably to be considered under section 3162(a)(2). In our judgment, neither the administration of justice, generally, nor the administration of the Speedy Trial Act, in particular, would be ameliorated by an order permitting the defendant to go scot free.

We need go no further. Because the court below gave significant weight to an inappropriate factor and reached a result which, by its own admission, would be insupportable but for that factor, see Hastings I, slip op. at 11-14, we conclude that the first indictment was properly

dismissed without prejudice and that the motion to reconsider should have been denied. Accordingly, we reverse and remand for further proceedings consistent herewith. Since there is no longer a legal bar to Hastings's reprosecution, the second indictment should be reinstated for trial.[10]

Reversed and remanded.

- Dissent follows -

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[10] The district court did not pass upon appellee's motions to impose sanctions or dismiss the later indictment for prosecutorial misconduct. Those motions are not before us and we intimate no view of their eventual resolution.

BREYER, Circuit Judge (dissenting). The majority evidently believes that the district court either (1) considered "an irrelevant or improper factor" or (2) when weighing relevant factors, committed "a clear error of judgment." United States v. Hastings, No. 87-1782, slip op. at 13, supra, (quoting United States v. Kramer, 827 F.2d 1174, 1179 (8th Cir. 1987)). I do not agree.

In my view, the district court could consider the government's misconduct as relevant even though it did not harm this particular defendant. The "misconduct" amounted to violating frequently a local rule that instructed the government to give defendants certain information automatically; instead, the government forced defendants either (a) to file a motion asking for the information, thereby stopping the speedy trial clock, 18 U.S.C. § 3161(h)(1)(F) (1982), or (b) to do

without early access to the information. This kind of rule violation may harm other defendants to whom the local rule applies, in ways related to the Speedy Trial Act, but which do not directly involve a violation of that Act (e.g., some defendants may forego early access to the information). Where governmental misconduct is serious, courts sometimes dismiss indictments even though the defendant fails to show the misconduct prejudiced him in particular. See United States v. Ballivan, 819 F.2d 266, 267 (11th Cir. 1987) (observing that "a pattern of widespread and continuous misconduct" might warrant a dismissal of an indictment with prejudice for governmental misconduct even if defendant fails to show such misconduct seriously prejudiced him). See also Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961) (Friendly, J.). Here, the misconduct is not as serious as in the

cited cases, but neither does dismissal here rest on the misconduct alone; rather, what is at stake is the district court's authority to take the misconduct into account as one of several relevant factors, when deciding whether to dismiss with or without prejudice. The Act's references to "impact of reprosecution on the administration of this chapter and on the administration of justice" seem adequate statutory authority to place this sort of speedy-trial-related governmental misconduct in the balance.

If we concede the misconduct is relevant to the reprosecution decision, I do not see how we can say the district court made a "clear error of judgment." As a general rule, appellate courts have recognized that the district courts have considerable power to decide whether or not to permit reprosecution. I have found 29 appellate court cases decided since January

1, 1981 reviewing district court determinations to dismiss with or without prejudice; of these, only one involved a straight reversal of a district court's determination supported by reasons. United States v. Caparella, 716 F.2d 976 (2d Cir. 1983). (Two others involved reversals where the district court failed to provide reasons for its decisions. United States v. Kramer, 827 F.2d 1174, 1179 (8th Cir. 1987); United States v. Phillips, 775 F.2d 1454 (11th Cir. 1985).) Moreover, the government's "misconduct" here also concerns a local rule that the district courts must administer, a matter where those courts have particular authority. Though the question seems a close one, I cannot say the district court has made a mistake of law.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIM. NO.
	)	86-0419-F
KENNETH HASTINGS	)	

MEMORANDUM

March 10, 1987

FREEDMAN, C.J.

Before the Court is defendant's motion to dismiss the indictment because of an alleged violation of the Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161 et seq. ("the Act"). On March 6, 1987 the Court entered an Order allowing the motion and dismissing the indictment without prejudice.

I.

The Act's basic rule, applicable to the circumstances of this case, is as follows:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an Information or Indictment with

> the commission of an offense shall commence within seventy (70) days from the filing date (and making public) of the Information or Indictment or from the date the defendant has appeared before a judicial officer of the Court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c) (1).

The defendant was arrested on November 20, 1986 and a complaint issued the same day charging him with various federal drug offenses. Also on November 20, the government moved for pretrial detention. Defendant was temporarily detained pending a detention hearing held by the Magistrate on November 25. Following the hearing, the Magistrate ordered defendant detained but permitted the defendant to attend an "inpatient" detoxification treatment program at Spectrum House. On December 17, 1986 the Grand Jury returned the instant indictment. The same day, the defendant was arraigned and, after a further hearing, again ordered detained pending trial.

Assuming no exclusions of time, defendant was required to be tried by February 25, 1987.

As the First Circuit has instructed, in ruling on a motion to dismiss under the Act, "the district court must review the course of events from the indictment up to the filing of the motion to dismiss, tracking each motion and proceeding which occurred during that period and evaluating the resultant delay under the Act." United States v. Pringle, 751 F. 2d 419, 429 (1st Cir. 1984). In light of this command, the Court will attempt to sort through what occurred between December 17, 1986 and March 6, 1987, the date of the Order dismissing the indictment.

II.

At defendant's arraignment the Magistrate established a routine pretrial schedule calling for automatic discovery to be provided by December 24, 1986; defense

motions due by January 14, 1987; responses from the government due by January 21, 1987; a motions hearing before the Magistrate on January 26, 1987; and trial on February 23, 1987. The government sent automatic discovery material to defendant's former attorney on December 19, 1986. On January 8, 1987 defendant's current attorney, Miles Jacobson, filed his appearance.

On January 12, 1987 the government received a telephone call from Attorney Terry Nagle, Mr. Jacobson's associate, requesting a ten-day extension of the January 14, 1987 deadline for filing defense motion. Assistant United States Attorney Henry Rigali assented with the proviso that an appropriate disappearance be filed by former counsel and that the government have a parallel extension for the government's response. In an affidavit, Mr. Rigali states:

I was not aware that Attorney Nagle then had a similar conversation with the Deputy Clerk of Court. Based upon my information and belief, the Deputy Clerk of Court, who obviously had a similar conversation with Attorney Nagle (see Nagle Affidavit), immediately rescheduled the January 26, 1987 hearing (copy attached). On January 13, 1987 the government received written notice that the hearing date for contested motions, then scheduled for January 26, 1987, had been continued for twelve (12) days and rescheduled to occur on February 6, 1987. In Attorney Nagle's Affidavit, he states that on the day following our telephone conversation (January 13, 1987), he called the United States Attorney's Office and left a message to the effect that Mr. Jacobson did not intend to file pretrial motions. I do not dispute this fact, however, I was not personally informed of it. However, based on information and belief, the scheduling order change had already gone into effect prior to Attorney Nagle's second call to the Clerk of Courts stating that it was the defendant's intention not to file pretrial motions and therefore, that he was withdrawing his request for a ten-day extension. On information and belief, the twelve-day extension of time would not have occurred but for the request of counsel.

Rigali Affidavit at 2-3.

After having spoken to the Magistrate's Deputy Clerk, the Court has determined that Mr. Nagle never informed the Court of any request for an extension of time. The rescheduling of the contested motion hearing was not, as reasonably assumed by Mr. Rigali, caused by defendant's request for an extension of time, but was actually initiated by the Magistrate who cancelled all hearings for January 26, 1987.[1]

On January 15, 1987 Mr. Rigali and Mr. Jacobson conferred by telephone about, among other things, the possibility of the defendant changing his plea. According to Mr. Rigali, Mr. Jacobson agreed that the evidence against the defendant appeared to be "insurmountable," and that a plea was

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[1] On March 6, 1987, Assistant United States Attorney Rigali submitted a supplemented affidavit in which he states that he has consulted with the Magistrate's Deputy Clerk who informed him of these facts.

likely. Rigali Affidavit at 3. Mr. Jacobson disputes this. He denies he agreed that the evidence appeared insurmountable or that a plea was likely. According to Mr. Jacobson, he indicated that the government did have a strong prima facie case and thought it appropriate to begin plea negotiations. Jacobson Second Affidavit at 1.[2]

In Mr. Jacobson's First Affidavit he states that he learned, in a conversation with the Deputy clerk, that the trial date of February 23, 1987 would have to be changed because of the Court's absence that week. Jacobson's First Affidavit at 1. Mr. Rigali states in his affidavit that he

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[2] On March 4, 1987 Jacobson filed two affidavits; one at the hearing on the motion to dismiss and the other previously. For clarity sake, the two-page affidavit filed previously will be referred to as Jacobson's First Affidavit. The affidavit filed in court and ordered impounded will be referred to as his Second Affidavit.

"had no knowledge of this information. Specifically, I was never informed by the Court or anyone else that trial was not to occur February 23, 1987, until late in the day, Friday, February 20, 1987, after I had prepared the government's motion to continue the trial." Rigali Affidavit at 4.

Contrary to Mr. Rigali's stated ignorance, on February 2, 1987 (exactly three weeks prior to the scheduled trial date!), during the course of an unrelated criminal trial, United States v. Michael Abeid, Cr. Nos. 86-281 & 86-352, the Court personally informed Mr. Rigali of its scheduled absence during the week of February 23, 1987.[3]

On February 18, 1987 Mr. Rigali met with Mr. Jacobson and had further

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[3] The Court directed the court reporter to transcribe relevant portions of a bench conference during the Abeid trial. It is reproduced as the Appendix to this Memorandum.

discussions related to a plea agreement. The meeting did not resolve the discussions; it was left that Mr. Rigali would be in touch with Mr. Jacobson in the next few days.

On February 20, 1987, Mr. Rigali wrote to Mr. Jacobson and set forth the government's final position regarding a plea. Mr. Rigali attempted to telephone Mr. Jacobson to communicate the content of his letter, but Mr. Jacobson was not in his office that day.

Also on February 20, 1987 Mr. Rigali prepared and filed a motion for a two-week continuance. As grounds for the continuance the motion stated that "Counsel for the Government and Defendant are presently discussing means to resolve of [sic] this matter by means other than trial." According to Mr. Rigali, just prior to the filing of the motion did he learn that the Court would be unavailable

the week of February 23.

On February 23, 1987 Mr. Rigali and Mr. Jacobson again conferred by telephone. Mr. Rigali informed Mr. Jacobson of his motion for a continuance. There were also further discussions about a plea agreement. Mr. Rigali states that based on Mr. Jacobson's "representations," it was his opinion that the defendant intended to plead guilty to the indictment and that he had no objection to the continuance. According to Mr. Rigali, "Attorney Jacobson, at no time, expressed any disagreement, opposition or reservation about the government's Motion to Continue. In my opinion, he appreciated the government filing the motion on his behalf because his client would be the primary beneficiary of an extension of the trial date." Rigali Affidavit at 7.

On February 26, 1987 defendant filed his opposition to the motion for a continuance. Defendant stated that he did

not join in or agree to the government's motion. Mr. Jacobson also denies that he implicitly consented to the motion during his conversation with Mr. Rigali.

On February 26, 1987, the Deputy Clerk advised Mr. Jacobson and Mr. Rigali that the trial had been rescheduled for March 4, 1987.

After he received defendant's opposition and had his conversation with the Deputy Clerk, Mr. Rigali, on February 26, 1987, filed a response and a motion to exclude time based on the interests of justice. See 18 U.S.C. § 3161(h) (8) (A). The same date, Mr. Rigali had a further conversation with one of Mr. Jacobson's associates who professed continued interest in plea negotiation. As late as 1:10 p.m. on this date, Mr. Rigali and Mr. Jacobson were still having discussions about the possibility of a plea agreement.

On March 3, 1987 defendant filed an

opposition to the government's motion to exclude time and a motion to strike statements made by defense counsel made during plea negotiations pursuant to Fed. R. Crim. P. 11(e) (6) (D).[4] On February 25, 1987 defendant filed the instant motion to dismiss for Speedy Trial Act violations.

III.

Having thus recounted what proceeded between the indictment and the filing of the instant motion, the Court must now determine what period of time, if any, must be excluded from the seventy-day limit.

The government initially sought to exclude two periods of time: twelve days from January 16, 1987 through February 6, 1987 because of the rescheduling of the contested motions before the Magistrate, and from February 20, 1987 through March 4,

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[4] Inasmuch as the Court has impounded the offending document, no action on this motion need be taken.

1987 during which the government's motionfor a continuance was pending. As to the first period, it now appears clear that, in fact, no continuance was ever requested by defendant, nor was one ever granted. See, supra at n. 1. The Court, therefore, need only concern itself with the second period.

Among the periods of delay the Act excludes is delay resulting from the pendency of a pretrial motion. The relevant subsection provides as follows:

> (h) The following periods of delay shall be excluded in computing the time . . . within which the trial of any such offense must commence:
>
> > (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --
> >
> > . . . .
> >
> > > (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion. . . .

18 U.S.C. §3161.

Subsection (F) has been interpreted to contain rules for excluding time for pretrial motion in two distinct situations. The first, not at issue here, is when hearing is held on the motion. The second is when a motion is adjudicated without a hearing on the basis of the papers before the Court. In the second situation, the time from when the Court receives all necessary papers through the "prompt disposition" of the motion is excludable. Henderson v. United States, 90 L. Ed. 2d 299, 308 (1986); United States v. Carter, 803 F.2d 20, 21 (1st Cir. 1986).

As stated above, the government contends that the entire period from February 20 through March 4, 1987 should be excluded because of its motion for a continuance pursuant to subsection (F). Defendant disagrees. Defendant maintains that "[m]otions for a Continuance are

governed by 18 U.S.C. §3161(h)(8) and do not result in automatic tolling upon filing as to other motions under §3161(h)(1)(F)." Defendant's Second Further Memorandum at 1.

Defendant's argument has some appeal in logic. If the government's view is accepted, evasion of the Act's seventy-day limit could be easily accomplished--the government need only wait until the sixty-ninth day to file a motion for a continuance. By the time the defendant's opposition is received and the Court rules, the government will have been successful in unilaterally expanding the seventy-day period.

Despite these legitimate concerns, the Court is not prepared to rule at this time that a motion for a continuance is excluded from subsection (F) for a variety of reasons. First, motions for a continuance are literally included within subsection (F)'s expansive language ("delay resulting

from any pretrial motion"). Second, the type of evasive conduct at the heart of defendant's concerns is subject to the Act's sanction provision--18 U.S.C. §3162(b). Third, at least one case has found that a motion for a continuance is included within subsection (F). United States v. Darby, 744 F.2d 1508, 1518 (11th Cir. 1984). Finally, the resolution of this point does not affect the outcome of defendant's motion because, as the Court will next discuss, assuming the government's motion for a continuance does toll the period, the length of the time to be excluded would be insufficient.

Assuming, therefore, that the government's motion does automatically toll the period, what period of delay, if any, should be excluded? Because subsection (F) provides that in cases in which a hearing is not necessary, the time from the filing of the motion through its "prompt

disposition" should be excluded, the inquiry must be when was there a disposition of the government's motion.

Defendant argues that, in effect, the motion was disposed of before it was filed. Defendant states: "The motion requested a continuance of the trial date set for February 23, 1986 [sic]. In fact, before the day the motion was filed, the trial date of February 23 had already been cancelled. Therefore, even were the filing of a motion for continuance to have the effect of tolling, in this case the number of days to be excluded would be zero." Defendant's Second Further Memorandum at 1-2.

The Court must agree. But even if the motion was not considered disposed of by February 20, it most certainly was when the date for trial--February 23--came and went. It is hard to understand what is left to resolve in a motion for a

continuance after the original date has passed. Based on either of these explanations the Court concludes that the Act was violated when defendant's trial was not commenced in a timely fashion.

IV

Having concluded that the Act was violated, the Court must order that the indictment against the defendant be dismissed. The next question is whether the dismissal should be with or without prejudice. The Act provides:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. § 3162(a) (2). The Court will now examine each of these factors.

Defendant is charged in an eight-count indictment as follows: Counts I through

VII allege that defendant possessed with the intent to distribute or did distribute cocaine and methamphetamine on four separate occasions in violation of 21 U.S.C. § 841(a) (1). Count VIII alleges that on the last of these occasions, November 20, 1986, defendant knowingly and intentionally carried a firearm on his person during the commission of the drug trafficking offense in violation of 18 U.S.C. § 924(c).

Defendant was alleged to have been in possession of significant amounts of controlled substances on four occasions. As the Magistrate found during the detention hearing, the weight of the evidence against defendant is overwhelming.

More significant is the allegation that defendant was armed with a concealed semiautomatic pistol loaded with live ammunition at the time of one of the drug transactions. Congress has provided a

sentence enhancement of a minimum of five years for a violation of 18 U.S.C. § 924(c).

In mitigation, defendant states that he had a valid Massachusetts license for a firearm. However, as the government points out, the license provided authority only for target practice and hunting. Defendant also argues in mitigation the fact that all other participants in the alleged drug offenses were government agents. According to the defendant, "[t]he government's inability to reprosecute Mr. Hastings, in the event of dismissal with prejudice, will not leave in tact [sic] an ongoing drug distribution organization." Defendant's Memorandum at 4.

On balance, the Court considers the offenses with which defendant is charged to be extremely serious. The fact that an individual has an unexpired gun permit hardly detracts from the danger to law enforcement officers and the public when

firearms are part of a drug transaction. Also, in the Court's view, the fact that defendant is not charged with being a part of an ongoing conspiracy is counter-balanced, to some extent, with his participation in four discrete drug transactions involving considerable quantities of cocaine and methamphetamines.

Viewing the events between indictment and the instant motion, the overriding feature is a lack of bad faith. While there certainly should have been greater diligence on the part of the prosecution and the Court, the very slight delay hardly prejudices defendant in any severe fashion. The government suggests that defendant has been attempting to "have his cake and eat it too," by leading the government along in plea negotiations only to then rely on the Speedy Trial Act. The Court sees no evidence that defendant or his counsel were insincere about the plea

negotiations. There is no reason why a defendant cannot continue to negotiate up until the eve of trial without forfeiting a valid Speedy Trial Act defense.

The Court concludes that reprosecution will not have serious effects on the administration of this Act or on the administration of justice. The Act was violated only by a matter of a few days. Defendant has not cited to any case, and the Court has been unable to find any, in which a case has been dismissed with prejudice on comparable facts. The Court also recognizes that the dismissal of this indictment, even without prejudice, is likely to have a significant educative and deterrent effect. Both this Court and the prosecutor's office will no doubt be more diligent in watching the Speedy Trial calendar. Dismissing this case with prejudice would not demonstrably improve these effects sufficient to outweigh the

public interest in the reprosecution of a rather serious offense.

On balance then, considering the very serious nature of the crime, the circumstances leading to dismissal and the effect of reprosecution on the administration of the Act and the administration of justice, the Court concludes that the indictment should be dismissed without prejudice.

An Order was issued on March 5, 1987.

Chief United States District Judge

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

VS CR#86-281
CR#86-352

MICHAEL ABEID

EXCERPT OF BENCH CONFERENCE held on February 2, 1987, U.S. District Court, District of Massachusetts, Springfield, Massachusetts, before Freedman, Chief District Judge.

APPEARANCES

HENRY L. RIGALI, ASSISTANT U.S. ATTORNEY

GEORGE NASSAR, ESQ., representing the Defendant.

Susan Zomermaand
Federal Court Reporter

1550 Main Street
Springfield, MA 01103

(Excerpt of side bar conference held on 2-2-87 with the Court, Mr. Rigali, and Mr. Nassar)

THE COURT: When can counsel be ready for trial?

MR. NASSAR: I would get ready quickly.

MR. RIGALI: About two weeks, your Honor.

THE COURT: Two weeks. How long will the trial take?

MR. RIGALI: Well, two trials. First one, you have been through. That took about three days.

MR. NASSAR: Wouldn't be that long.

THE COURT: Yambo?

MR. RIGALI: Yambo.

THE COURT: Same type of evidence?

MR. RIGALI: Exactly the same.

THE COURT: Are all the agents local?

MR. RIGALI: They are all local.

MR. NASSAR: Everybody is local.

MR. RIGALI: True.

THE COURT: If you can be ready for trial, we can have the first trial next week.

MR. RIGALI: Well, again, I don't know what the schedule is. I'm not going to say these people are available. I don't know where these officers are right now, but I would say no more than two weeks, and then you have the second trial.

THE COURT: It will be delayed two weeks, because I don't have time the following week. I go away for a week. My flight is paid for. I allow lawyers to go away; I'm sure going to go away, so I would suggest you take this next hour to talk together amongst yourselves, and your respective clients. You check with your agents; find out who is available, and whether

they would be ready for trial either this week, or by Monday, at the latest; a week from today, And then report back to me, and do what you want to do. I will have to hear it in open court.

MR. NASSAR: Come back at two?

THE COURT: Yes.

MR. RIGALI: Two o'clock?

THE COURT: Or make it 2:30. I'll give you an extra half-hour.

MR. NASSAR: All right.

MR. RIGALI: All right.

(End of excerpt of bench conference)

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIM. NO.
	)	87-0058-F
KENNETH HASTINGS	)	

MEMORANDUM AND ORDER

July 22, 1987

FREEDMAN, C.J.

Defendant is charged in a nine-count indictment with possession and distribution of cocaine and methamphetamine, 21 U.S.C. § 341(a) (1), and carrying a firearm during the commission of a drug offense, 18 U.S.C. § 924(c). This indictment was returned after the Court ordered that a previous eight-count indictment be dismissed without prejudice because of a violation of the Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161 et seq ("the Act").

Defendant now moves to dismiss the instant indictment or for reconsideration

of the earlier dismissal without prejudice, to suppress evidence, and for sanctions and further discovery.

On June 2, 1987 the Court heard oral arguments on the motion to dismiss or for reconsideration and ordered the parties to file supplemental briefs on all outstanding pretrial motions. The parties have now done so. In light of the Court's disposition of the motion to dismiss or for reconsideration, the Court will not address the other motions.

I. BACKGROUND

Defendant was arrested on November 20, 1986 and ordered detained pending a hearing. On November 25, defendant was arraigned and, after a detention hearing, again ordered detained pending trial. Absent periods of excludable delay, the Speedy Trial Act required defendant to be tried by February 25, 1987. 18 U.S.C. §

3161(c)(1).[1]

On December 19, 1986 the government sent former defense counsel an automatic discovery letter stating, inter alia:

> Pursuant to the Uniform Order for Automatic Discovery issued by the Court in the above matter on December 17, 1986, the government provides you with the following:
>
> .....
>
> 7. The government is not in possession of any exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963); United States v. Augurs, 427 U.S. 97 (1976); Smith v. Phillips, 455 U.S. 209 (1982). The government is aware of its continuing duty.
>
> .....
>
> 9. If any promises, rewards or inducements have been given to any witness that the government intends to call as a witness during the trial of this case, you will be advised of same prior to the testimony of that witness.

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[1] Section 3161(c)(1) of Title 18 provides: "In any case in which a plea of not guilty is entered, the trial of a defendant charged in an Information or Indictment with the commission of an offense shall commence within seventy (70)

(Footnote continued)

Counsel for the parties engaged in plea negotiations during the months of January and February 1987. Throughout the pendency of the first indictment, defendant never filed any motions. Because of the unavailability of the Court and the progress of plea negotiations, trial was not begun within the speedy trial period. Defendant moved to dismiss the indictment alleging that the Speedy Trial Act had been violated.

On March 6, 1987 the Court allowed the motion, dismissing the action without prejudice. The Court gave its rationale in a Memorandum issued on March 10, 1987. After reviewing the events from the filing

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(Footnote continued)

days of the filing date (and making public) of the Information or Indictment or from the date the defendant has appeared before a judicial officer of the Court in which such charge is pending, whichever date last occurs."

of the indictment through the filing of the motion to dismiss, the Court concluded that because no period of delay could be excluded, the Act had been violated and dismissal was required. Memorandum at 7-10. See 18 U.S.C. § 3162(a)(2). After weighing the factors specified in the Act, 18 U.S.C. § 3162(a)(2), the Court concluded that dismissal should be without prejudice.

Defendant was ordered released from federal custody on March 6, 1987. On March 9, 1987, after being advised by his counsel that a new arrest warrant had issued against him, the defendant voluntarily surrendered himself to the Springfield office of the Drug Enforcement Administration. Defendant was reindicted on March 11, 1987. In addition to the first eight counts which were also contained in the dismissed indictment, the new indictment added a ninth count alleging an additional count of possession of

controlled substances with the intent to distribute.

On March 12, 1987, during his arraignment on the instant indictment, the Magistrate inquired of the prosecution whether the government had in its possession any automatic discovery material that had not already been provided. The government's attorney responded that "automatic discovery has been provided." Tr. March 12, 1987 at 4. Defendant's counsel objected and raised the issue of whether the government's response to the issue of whether promises, rewards or inducements had been made (response #9, quoted supra at 2-3) was adequate. The Magistrate stated that he did not consider this response to comply with Local Rule 42. Id. at 16. The Magistrate ordered the Assistant United States Attorney "to put together a new automatic discovery response, complying with your

interpretation [of] the Government's obligations under the automatic discovery rules. I would say that you should look at Local Rule 42 as far as #9 goes, the issue of promises, rewards and inducements."

On March 16, 1987 the Assistant United States Attorney sent a second automatic discovery letter to defendant's counsel. This letter contained the following response:

> (4) Records [sic] and Inducements
>
> The individual who assisted the government during its investigation of the defendant received $1,150.00. The Drug Enforcement Administration has also informed said individual that it may receive additional funds in the future. No other promises, records [sic] or inducements are known to have been provided.

The exhibits to this letter demonstrate that this informant was present or involved in the transaction which formed the basis of each count of the indictment. According to the defendant, "the informant's testimony would be necessary for the

government even to make a prima facia [sic] case as to counts I-V." Defendant's Memorandum on Motion to Dismiss and Other Motions Pending Before the District Court at 7. The government does not dispute the importance of this individual to its case.

On March 18, 1987 the defendant requested further automatic discovery. On March 19, 1987 the government declined to supplement its discovery response without order of the court. Defendant thereupon filed his motion to dismiss or for reconsideration of the dismissal without prejudice and motion for further discovery and/or sanctions.

In its memorandum in opposition to defendant's motions, the government provided further information about the nature of its arrangement with the confidential informant:

> In return for his cooperation, the government agreed to reimburse the informant all expenses,

> including lost wages and the cost of use of the informant's automobile. (The informant has been employed throughout the investigation). To date, the informant has received $1150.00 in expense money.
>
> The Drug Enforcement Administration has informed the informant that he may receive a financial reward for his services upon the completion of the case. The informant was not promised that he would receive a reward depending upon the agency's budgetary status at the time, but merely that a reward was possible. The informant has been told by the Drug Enforcement Administration and the U.S. Attorney that payments to the informant for either expense money or as a reward, specifically and emphatically are not contingent on the arrest or conviction of any person, including the defendant.

Having thus recounted what transpired during the pendency of the two indictments, the Court can turn to defendant's motion.

II. DISCUSSION

The essence of defendant's motion is that, in light of recently discovered evidence, viz, the fact that the government

failed to provide automatic discovery material, the Court should reconsider its decision to dismiss the earlier indictment without prejudice. More to the point; defendant argues that, had the Court known at the time it dismissed the earlier indictment that the government had violated Local Rule 42 by failing to provide defendant with the discovery material to which he was automatically entitled, the dismissal would have been with prejudice. In the alternative, the defendant asks that the instant indictment be dismissed for failure to comply with Fed. R. Crim. P. 16 or pursuant to the supervisory powers of the Court.

In order to determine whether reconsideration is appropriate it is necessary for the Court to look back in time to see what motivated it to dismiss the first indictment without prejudice. The Court considered the factors specified

in the Speedy Trial Act--"the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2).

The Court noted that defendant was accused of possession with the intent to distribute "significant" amounts of cocaine and methamphetamine on four separate occasions. On the last of these occasions, defendant was alleged to have knowingly and intentionally carried a firearm on his person during the commission of the drug offense, thus subjecting defendant to a sentence enhancement of a minimum of five years. 18 U.S.C. § 924(c). The Court stated: "On balance, the Court considers the offenses with which defendant is charged to be extremely serious." Memorandum at 12.

The Court characterized the events between the indictment and the motion to dismiss by stating that "the overriding feature is a lack of bad faith." Id. The Court also noted that "[w]hile there certainly should have been greater diligence on the part of the prosecution and the Court, the very slight delay hardly prejudices defendant in any severe fashion." Id. at 12-13.

Finally, the Court considered the effect that reprosecution would have on the administration of the Speedy Trial Act and on the administration of justice:

> The Court also recognizes that the dismissal of this indictment, even without prejudice, is likely to have a significant educative and deterrent effect. Both this Court and the prosecutor's office will no doubt be more diligent in watching the Speedy Trial calendar. Dismissing this case with prejudice would not demonstrably improve these effects sufficient[ly] to outweigh the public interest in the reprosecution of a rather serious offense.

Id. at 13. After balancing these considerations, the Court concluded that dismissal of the indictment should be without prejudice.

The Court's view of some of these factors remains the same. Certainly, the circumstances of defendant's alleged conduct, particularly his possession of a loaded weapon during the commission of the offense, are still viewed by the Court as being extremely serious. The Court also continues to reject the government's accusation that defense counsel was trying to "lead the government along," conducting plea negotiations while silently awaiting the expiration of the speedy trial period. What has changed in the wake of the government's violation of Local Rule 42 is the Court's view of the bona fides of the prosecutor and the impact of reprosecution on the administration of the Speedy Trial Act and the administration of justice.

The rules of this Court were substantially revised in 1986. These new rules became effective July 1, 1986. These new rules became effective July 1, 1986 and were to apply to all proceedings pending or commenced after this date. Local Rule 2(b). Local Rule 42 regulates discovery in criminal cases. This rule provides:

> In all criminal cases, the following material and information in the possession, custody or control of the parties, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the parties, shall be disclosed to the opposing party.
>
> Such disclosure will be routine and automatic, i.e., without any court order in the particular case. It should occur as soon as counsels' trial engagements permit and in all events within fourteen (14) days after arraignment.
>
> (a) The Government shall disclose, and allow the defendant to inspect, copy and photograph, all written material as follows:
>
> .....

(7) If any promises, rewards, or inducements have been given to any witnesses, a written statement of any such promises, rewards or inducements.

.....

(c) Any duty of disclosure and discovery set forth herein is a continuing one.

(d) If in the judgment of either party it would be detrimental to the interests of justice to make any of the disclosures set forth above, such disclosures may be declined and the opposing party advised in writing, with a copy to the clerk, of the specific matters on which disclosure is declined and the reasons for declining, within seven (7) days of the date of the arraignment. If the opposing party seeks to challenge the declination, said party shall file forthwith a Motion for Further Discovery accompanied by a supporting memorandum, and, if appropriate, affidavit(s).

The government readily admits that it violated this rule but contends that its violation was not done in bad faith, was more technical than substantive, and that defendant was not prejudiced by it in any case.

Originally, the government explained that its violation of Rule 42

> was the result of the Government's failure to update the standard "automatic discovery letter" form historically issued by the United States Attorney prior to the July, 1986 rules change. This fact does not justify or excuse the error, to which the Government readily confesses, but certainly demonstrates the lack of intentional misconduct or bad faith on its part.

Government's Response to Hastings' Motion to Dismiss and Request for Reconsideration at 2.

This attempted justification is highly problematical. Prior to the new local rules, automatic discovery in this district was regulated by this Court's standing Uniform Order for Automatic Discovery in Criminal Cases ("Uniform Order"), which was in effect from January 1, 1974 until it was supplanted by the new Local Rules on July 1, 1986. The Uniform Order contained the

following provisions:

> In all criminal cases brought in this district ... the following material and information in the possession, custody or control of the parties, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the parties, shall be disclosed to the opposing party.
>
> Such disclosure will be routine and automatic, i.e., without any court order in the particular case. It shall occur as soon as counsels' trial engagements permit and in all events within 14 days after arraignment. ...
>
> A. The Government shall disclose, and allow the defendant to inspect, copy and photograph, all written materials as follows:
>
> ....
>
> 7. If any promises, rewards or inducements have been given to any witnesses, a written statement of any such promises, rewards or inducements.
>
> ....
>
> C. Any duty of disclosure and discovery set forth herein is a continuing one.
>
> D. If in the judgment of the United States Attorney it would be detrimental to the interests

> of justice to make any of the disclosures set forth above, such disclosures may be declined and defense counsel advised in writing, with a copy to the Clerk, of the specific matters on which disclosure is declined and the reasons for declining, within seven (7) days of the date of the arraignment. If the defendant seeks to challenge the declination he shall file forthwith a Motion for Further Discovery accompanied by a supporting memorandum and, if appropriate, affidavit(s).

Comparing the texts of the Uniform Order with Local Rule 42, it is readily apparent that the two rules are virtually word for word identical. If for no other reason then, this explanation calls into question the good faith of the prosecutor. It also demonstrates that the government's failure to comply with the Uniform Order is not of recent vintage.[2]

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[2] During defendant's arraignment, the Magistrate commented that a former Assistant United States Attorney in charge of the Springfield office, "always lived in horror that any defense counsel would ever figure out that [the government is] supposed to supply promises, rewards and

(Footnote continued)

Perhaps realizing that its earlier proffered explanation was less than persuasive, the government, in its post-argument memorandum, shifts the focus by asserting that its violation of Local Rule 42 was really one of form rather than substance. Rather than having responded as it did in the original automatic discovery letter by stating that if promises, rewards or inducements had been given defendant would be so informed prior to the testimony of such a witness, the government now suggests that it should have made use of the provisions available under Local Rule 42(d) and responded:

> In the judgment of the United States Attorney, it would be detrimental to the interests of justice to disclose promises,

---

(Footnote continued)

inducements and when he went into private practice he immediately brought it to the Court's attention that they had an obligation to do that." Tr. March 12, 1987 at 20.

> rewards or inducements at this time. Disclosure of said information would tend to identify government witnesses thereby subjecting them to harassment, humiliation and danger. The government will disclose said information when it is certain that the safety of its witnesses can be

insured and, in any event, prior to the start of trial. Government's Memorandum Regarding Defendant's Motions for Dismissal, Reconsideration and Sanctions at 12.

Ordinarily, the Court would be hesitant to doubt the government's expressions of concern about the safety of an informant. In this case, however, these post hoc concerns appear disingenuous. After all, the automatic discovery rule did not require the government to disclose the informant's identity, merely the fact that inducements had been made. In addition, the fact that the government readily supplied the inducement information in the second indictment casts into doubt the genuineness of the government's fears about

the safety of its witness.

The automatic discovery responses provided by the government in this indictment has also not been beyond reproach. As stated above, supra at 4, at defendant's arraignment the government's initial position was that all automatic discovery had already been provided. It is an open question whether or not the government would have disclosed its arrangement with the confidential informant without the early prodding of the Magistrate. In addition, at oral argument, the government characterized the payment of $1,150 to the informant as reimbursement for expenses. Subsequently, in its post-argument memorandum, the government acknowledged that the informant "may receive a financial reward for his services upon the completion of the case." See supra at 5.

Just as significant as the Court's

reassessment of the good faith of the government is the detrimental effect the Court now finds that the reprosecution of Mr. Hastings will have on the administration of the Speedy Trial Act and the administration of justice in light of the government's violation of Local Rule 42.

This effect is clearly borne out by the government's further attempt to minimize the Rule 42 violation. According to the government: "The government's disclosure emphatically did not suggest, as the defendant implies, that no promises, rewards or inducements were afforded to its witnesses. To the contrary it clearly stated, inter alia, that if 'promises were made, the government declines to disclose them at this time.'" Government's Memorandum Regarding Defendant's Motions for Dismissal, Reconsideration and Sanctions at 12 (emphasis in original). In the government's view then, having implied

that promises, rewards or inducements had been paid to the key prosecution witness, the defendant should have taken the initiative and sought further discovery. As the Assistant United States Attorney put it at oral argument, "[c]ontrary to the representation of counsel, we don't say this material does not exist. We didn't mislead them. We simply say we are not going to give it to you. If you want it, you will have to get a court order to get it." Tr. June 2, 1987 at 6.

It is obvious that this approach is inconsistent with the very idea of automatic discovery--both Local Rule 42 and the Uniform Order require that information be required without a specific request from the defendant and without order of the court. The government's lapse is particularly unfortunate because of the importance of the information. Information about governmental payments to an

informant, either as expense money or as a reward, "is potent ammunition in a defense attorney's arsenal for impeaching a government witness." United States v. Richman, 600 F.2d 286, 291 (1st Cir. 1979).

If all that occurred in these cases were violations of automatic discovery rules then dismissal would obviously be an unwarranted sanction. Standing alone, the discovery violation has not seriously prejudiced the defendant because he has not actually been tried without the knowledge of the government's payment to the informant.[3] But there are more than discovery errors involved in this case. First, there is strong support in the record for the conclusion that the local

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[3] However, if the Court had not dismissed the original indictment for Speedy Trial grounds and had the defendant pleaded guilty (as everyone was expecting) without ever knowing of the payment to the confidential informant, a serious miscarriage of justice would have occurred.

office of the United States Attorney has had a long-standing policy of disobeying the Uniform Order. See supra at 11 & n. 2. Much more significant, however, is the unique interrelationship between the government's failure to provide automatic discovery and the violation of the Speedy Trial Act.[4]

The basic rule of the Speedy Trial Act is that absent periods of excludable delay, a criminal defendant has a right to have his trial commence within seventy days of the filing and making public of the indictment. 18 U.S.C. § 3161(c)(1). In cases in which a defendant is detained solely because he is awaiting trial, his trial must be commenced, absent periods of excludable delay, no later than ninety days

---

[4] There do not appear to be any reported cases specifically discussing the relationship between automatic discovery and the Speedy Trial Act.

following the beginning of the continuous detention period. 18 U.S.C. § 3164. Perhaps the most common reason for excluding time from these periods is the filing of pretrial motions. 18 U.S.C. § 3161(h)(1) (F). Counsel in nearly every criminal case can be expected to file one or more pretrial motions. While any one motion is pending, the speedy trial period is tolled. For a defendant who is in pretrial detention, such as Mr. Hastings, the filing of a pretrial motion carries with it the inevitable consequence of delaying his opportunity to be brought to trial and perhaps having his detention come to a conclusion.

The government's discovery approach in this case seriously prejudices a defendant's right to forego the filing of unnecessary pretrial motions and to be brought to trial within seventy days of arraignment. It undermines the effective

administration of the Speedy Trial Act and the administration of justice. A defendant in pretrial detention is put in the position of having to choose between two things to which he is clearly entitled: a speedy trial and the chance to be released from pretrial detention, and important impeachment evidence the disclosure of which is supposed to be "routine and automatic."

On the unique facts of this case--a defendant who files absolutely no motions, a violation of the Speedy Trial Act, a government policy of requiring a defendant to take the initiative to obtain important impeachment evidence to which he is automatically entitled--and notwithstanding the very serious nature of defendant's alleged criminal conduct, had all of this information been available to the Court on March 6, 1987 when it considered defendant's motion to dismiss the original

indictment, the Court would have ordered the dismissal be with prejudice. In light of the fact that information about the government's discovery violation was not known to the defendant or the Court at the time the earlier motion to dismiss was before the Court, reconsideration of the March 6, 1987 Order is now appropriate.[5]

III. CONCLUSION

Upon reconsideration, the Court determines that the original indictment should have been dismissed with prejudice. The instant indictment, therefore, being barred by the dismissal of the original indictment, is DISMISSED.

It is So Ordered.

Chief United States District Judge

[5] At oral argument, the Court invited the parties to respond to what other sanctions, short of dismissal, the Court could impose. The government has not suggested any.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1782

UNITED STATES,
Appellant,

v.

KENNETH HASTINGS,
Defendant, appellee.

JUDGMENT

Entered: May 17, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration, whereof, It is now hereby ordered adjudged and decreed as follows: The order of the district court is reversed and the cause is remanded to the district court for further proceedings in accordance with the opinion filed this day.

By the Court:

Francis P. Scigliano

Clerk.

SPEEDY TRIAL

§3161. Time limits and exclusions

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(h)(1)(F) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing

the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant including but not limited to --

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition, of such motion; . . .

§3162 Sanctions

(a)(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under

subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government ... (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit .... (4) otherwise will fails to proceed to trial without justification consistent with

section 3161 of this chapter, the court may punish any such counsel or attorney as follows:

(C) by imposing on any attorney for the Government a fine of not to exceed $250.

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1782

UNITED STATES,
Appellant,

v.

KENNETH HASTINGS,
Defendant, Appellee.

Before

Campbell, Chief Judge,

Breyer and Selya, Circuit Judges.

ORDER OF COURT

Entered: June 21, 1988

Upon consideration of appellee's "Motion For Consideration Of Petition Of Rehearing In Banc As A Petition For Rehearing And Motion To Recall Mandate",

It is ordered that mandate be constructively recalled and that the petition for rehearing in banc be also treated as a petition for rehearing.

It is further ordered that the petition for rehearing be denied and that mandate be constructively reissued.

By the Court:

Francis P. Scigliano

Clerk

LOCAL RULES

OF THE

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

RULE 42

Automatic Discovery in Criminal Cases

In all criminal cases, the following material and information in the possession, custody or control of the parties, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for the parties, shall be disclosed to the opposing party.

Such disclosure will be routine and automatic, i.e., without any court order in the particular case. It shall occur as soon as counsels' trial engagements permit

and in all events within fourteen (14) days after arraignment.

(a) The Government shall disclose, and allow the defendant inspect, copy and photograph, all written material as follows:

(1) All relevant written or recorded statements or confessions made by the defendant, or copies thereof.

(2) All relevant recorded testimony of the defendant before a grand jury.

(3) All relevant reports or results of physical or mental examinations, and of all scientific tests, experiments and comparisons, or copies thereof, made in connection with a particular case.

(4) All books, papers, documents, tangible objects, buildings or places, or copies, or portions thereof, which the Government

intends to use at the trial of the case, except reports, memoranda and other internal government documents made by the government agents in connection with the investigation or prosecution of the case.

(5) All exculpatory evidence within the meaning of Giles v. Maryland, 386 U.S. 66 (1967) and Brady v. Maryland, 373 U.S. 83 (1963).

(6) If the Government counsel's file indicates that any wire or oral communications have been intercepted. (See 18 U.S.C. §§2515-2518).

(7) If any promises, rewards or inducements have been given to any witnesses, a written statement of any such promises, rewards or inducements.

(b) The defendant shall disclose and allow the Government to inspect and copy or photograph all scientific or medical reports and all books, papers, documents, tangible objects or copies, or portions thereof, in the possession, custody or control of the defendant and which he intends to introduce at the trial, except reports, memoranda and other internal documents made by or in the behalf of the defense in connection with the mitigation or defense of the case.

(c) Any duty of disclosure and discovery set forth herein is a continuing one.

(d) If in the judgment of either party it would be detrimental to the interests of justice to make any of the disclosures set forth above, such disclosures may be declined and the opposing party advised in

writing, with a copy to the clerk, of the specific matters on which disclosure is declined and the reasons for declining, within seven (7) days of the date of the arraignment. If the opposing party seeks to challenge the declination, said party shall file forthwith a Motion for Further Discovery accompanied by a supporting memorandum and, if appropriate, affidavit(s).

(2)

No.

88 - 324

Supreme Court, U.S.
FILED
SEP 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

Kenneth Hastings, Petitioner

v.

United States, Respondent

SUPPLEMENTAL BRIEF TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PURPOSE OF SUPPLEMENTAL BRIEF

The purpose of this brief is to call the Court's attention to the fact that the pending indictment, No. 87-0058-F, was dismissed without prejudice by the government on August 30, 1988. Also, the petitioner argues that an important actual controversy still exists, although the pending indictment has been dismissed.

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No.

88 - 324

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

Kenneth Hastings, Petitioner

v.

United States, Respondent

SUPPLEMENTAL BRIEF TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT OF SUPPLEMENTAL FACTS

This brief by Kenneth Hastings supplements his petition for writ of certiorari filed and served on August 19, 1988.

BACKGROUND INFORMATION

Hastings is a criminal defendant whose case was dismissed by the Chief Judge of the United States District Court of

Massachusetts on Speedy Trial Act grounds. Originally, the indictment (no. 86-0419) was dismissed without prejudice on March 5, 1987. The jury had been impaneled but not sworn. As of March 5th, Hastings had been incarcerated for 106 days. He had been detained without bail, solely for the purpose of awaiting trial in this case. 18 U.S.C. §3142(e); 18 U.S.C. §3164. Once the dismissal occurred, he was released.

After dismissal, the government reindicted Hastings for the same offenses in indictment no. 87-0058-F. Then, because of a newly discovered pattern of governmental misconduct and bad faith, the district court reconsidered, and dismissed the original indictment with prejudice. Consequently, the second indictment (no. 87-0058-F) was also barred. On the government's appeal, a divided panel of the First Circuit reversed and reinstated

indictment no. 87-0058-F. Hastings then petitioned to this Court on August 19, 1988.

NEW DEVELOPMENT

On August 30, 1988, ten days after service of his petition, without Hastings' consent, the government dismissed indictment 87-0058-F pursuant to Fed. R. Crim. Pro. 48(a). (A copy of the dismissal is appended hereto, p. 1a. Hastings does not seek review of this dismissal.) As of the time of the dismissal, pretrial discovery and pretrial motions were still pending.

The express reason for the Rule 48(a) dismissal was that "the defendant is being prosecuted by other authorities for the same offenses." The "other authorities" refers to the Commonwealth of Massachusetts which indicted Hastings in November of 1987, indictment nos. 87-5985 through 5994. However, Hastings has never been

arraigned on the state charges and did not know of their existence until August 31, 1988 when he received the Notice of Rule 48(a) dismissal.

DISCUSSION

An actual controversy remains despite the Rule 48(a) dismissal, and the important reasons for granting the petition still exist.

In all cases, a case or controversy exists, for purposes of testing mootness, where legal consequences are unresolved. E.g., United States v. Concentrated Phosphate Export Association, 393 U.S. 199, 203 (1968); Church of Scientology v. United States, 485 F.2d 313, 316 (9th Cir. 1973); St. Pierre v. United States, 319 U.S. 41, 43 (1943). In criminal cases, because of practical collateral consequences, a controversy still exists, although a petitioner may have discharged his sentence before review in this Court. Sibron v. New

York, 392 U.S. 40, 57, 58 (1968).

In the instant case, Hastings has been accused of violations of criminal laws in both United States District of Massachusetts and in the Commonwealth of Massachusetts. He has not been convicted of any charges in either jurisdiction. While there has been no conviction, important practical and legal consequences remain to be resolved by this Court.

The legal consequences flow from the fact a Rule 48(a) dismissal does not constitute a final judgment. See, Rule 48(a) Fed. R. Crim. Pro.; United States v. Del Vecchio, 707 F.2d 1214, 1216 (11th Cir. 1983) (where the government was free to seek a superceding indictment after a Rule 48(a) dismissal.) In the present context, the lack of finality has two consequences. First, the United States is free to reindict Hastings for a third time on the

same charges. Were this to occur, Hastings would have no forum in which to raise the issues presented in his petition to this Court.

The second consequence relates to the indictments pending in the Commonwealth of Massachusetts. Although there is no double jeopardy issue, Massachusetts treats dismissals on statutory speedy trial grounds as barring all future prosecutions for the same offenses. Commonwealth v. Fields, 371 Mass. 274, 282 (1976); Commonwealth v. Ludwig, 370 Mass. 31, 34 (1976). (both cases citing M.G.L. ch. 176 §72, repealed and replaced by Mass. R. Crim. Pro. 36.); Commonwealth v. Balliro, 385 Mass. 618, 620 (1982) (holding that mandatory dismissals under Mass. R. Crim. Pro. 36 also bar subsequent indictments.) Therefore, were the relief Hastings seeks in this Court to be granted, it is likely

that the state prosecution would also be terminated.[1]

In addition to the immediate legal consequences, Hastings suffers practical consequences if the status of his federal prosecution remains unsettled. Hastings himself lives with his parents in a small community and works as a machinist in a local business. He has had no convictions, and other than the current, unresolved accusations against him, he is a citizen in good standing. The mere fact of unresolved accusations and the potential for

---

[1] Massachusetts has not decided a case where a federal prosecution was dismissed on Speedy Trial Act grounds. However, the policy reasons for dismissal would require dismissal for a case in this posture. See, Commonwealth v. Fields, 371 Mass. 274, 282 (1976); Commonwealth v. Ludwig, 370 Mass. 31, 34 (1976); Commonwealth v. Balliro, 385 Mass. 618, 620 (1982). These policy reasons would apply especially where, as here, the original investigation and arrest was a joint state and federal enterprise.

reindictment are damaging to his reputation and interfere with his future business plans. See, Sibron v. New York, supra. (regarding practical harm of a conviction).

In this case, there are undesirable legal and practical consequences which would be resolved, if this Court were to grant the relief requested in the petition. See, United States v. Concentrated Phosphate Export Association, supra, (where the mootness was tested by comparing relief requested with present status of the case).

Finally, the issues presented in the petition include important matters concerning statutory interpretation of the Speedy Trial Act and the role of the lower courts in enforcing the Act. The government should not be allowed to obtain a precedent in the court of appeals which

gives prosecutors freedom to act unlawfully and then be able to preserve that precedent by avoiding review in this Court.[2]

In the event this Court decides not to fully review the court of appeals decision, an appropriate action in this case may be to vacate the court of appeals' decision. See, United States v. Munsingwear, 340 U.S. 36, 39 (1950) (approving of the practice of vacating certain decisions below where the case became moot on its way to the United States Supreme Court.)

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[2] If the reasons for dismissal were truly related to the pending indictment in state court, the United States could have dismissed under Rule 48(a) prior to the decision in the court of appeals. Since the state indictments have been pending for over nine months (since November of 1987) without any activity, the Petite policy does not seem to explain the decision to dismiss this federal indictment.

CONCLUSION

Although the pending federal indictment has been dismissed, the actual controversy remains alive and the issues presented remain worthy for consideration by this Court.

Respectfully submitted

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO.
	)	87-0058-F
KENNETH HASTINGS	)	

DISMISSAL

Now comes Frank L. McNamara, Jr., United States Attorney for the District of Massachusetts, and, pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, hereby dismisses the above-captioned Indictment charging in the following violations: four counts charging violations of Title 21, United States Code, Section 841(a)(1) (distribution of cocaine and methamphetamine); two counts charging violations of Title 21, United States Code, Section 841(a)(1) (possession with intent to distribute methamphetamine and cocaine) and one count charging a violation of Title 18, United States Code, Section 924(c)

(carrying firearm during commission of felony). As reason therefore, the United States notes that the defendant is being prosecuted by other authorities for the same offenses.

Respectfully submitted,

FRANK L. McNAMARA, JR.
United States Attorney

Leave to file granted:

_____
Frank H. Freedman
Chief United States District Judge

Date: August 30, 1988

Federal Rules of Criminal Procedures

RULE 48 DISMISSAL

(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

(3)

Supreme Court, U.S.
FILED
OCT 11 1988
JOSEPH F. SPANIOL, JR.

No. 88-324

In the Supreme Court of the United States

OCTOBER TERM, 1988

KENNETH HASTINGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-324

KENNETH HASTINGS, PETITIONER

v.

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Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment with prejudice because of a Speedy Trial Act violation.

1. On December 17, 1986, petitioner was charged in an indictment returned in the United States District Court for the District of Massachusetts with seven counts of possession of cocaine and methamphetamine, in violation of 21 U.S.C. 841(a)(1), and one count of possession of a firearm during commission of a felony, in violation of 18 U.S.C. 924(c). On March 10, 1987, the district court dismissed the indictment without prejudice based on a five-day violation of the Speedy Trial Act, 18 U.S.C. 3161 *et seq.* (Pet. App. 51a-73a).

On March 11, 1987, a second indictment was returned, charging the same eight counts as the original indictment and adding one new count. On July 22, 1987, the district court reconsidered its previous speedy trial ruling and

ordered that the first indictment should have been dismissed with prejudice under the Speedy Trial Act, 18 U.S.C. 3162(a)(2), because the prosecutor had violated a local discovery rule in the original proceedings (Pet. App. 78a-105a). The district court therefore dismissed the second indictment.

The court of appeals reversed the dismissal of the second indictment and remanded the case for trial (Pet. App. 1a-50a). The court identified the three factors that 18 U.S.C. 3162(a)(2) mandates for consideration in deciding whether a Speedy Trial Act violation should result in dismissal with or without prejudice: the gravity of the charged offenses; the circumstances leading to dismissal; and the impact of a reprosecution on the administration of the Act and on the administration of justice. The court then found that the district court's characterization of the charged crimes as "extremely serious" was unassailable; that an administrative oversight and the unavailability of the trial judge had caused the delay, not the prosecutor's violation of the discovery rule; and that neither the administration of justice nor the administration of the Speedy Trial Act furnished any basis for dismissing the first indictment with prejudice. Pet. App. 1a-46a.

On August 30, 1988, following the decision of the court of appeals, the government voluntarily dismissed the indictment in this case, on the ground that petitioner was being prosecuted by other authorities for the same conduct (Supp. Br. App. 1a-2a).

2. Petitioner contends (Pet. 17-24) that a pattern of governmental misconduct that interferes with the administration of justice should be considered in the balancing process under 18 U.S.C. 3162(a)(2) even if the misconduct does not cause delay. Petitioner also contends (Pet. 24-32) that the court of appeals improperly substituted its judg-

ment for that of the district court in finding that the district court abused its discretion in dismissing the indictment with prejudice.

Because the government has dismissed the indictment against petitioner, it is highly unlikely that the decision of the court of appeals will have any real effect on petitioner.[1] To be sure, the voluntary dismissal of charges against petitioner leaves the government free to reindict petitioner at some time in the future. But even if, for that reason, this case is not technically moot, petitioner's claim is still not ripe for review, since the court of appeals did not enter a final judgment against petitioner. The court of appeals reversed an order dismissing the indictment with prejudice and remanded the case to the district court for trial. The court of appeals' decision thus places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss and the government had dismissed the indictment at that point.

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[1] We do not agree with petitioner's contention that the decision of the court of appeals should be reviewed because it could affect petitioner in a prosecution now pending against him in state court. Petitioner argues (Supp. Br. 6-7) that the Massachusetts courts treat speedy trial dismissals as barring all future prosecutions for the same offense, and that if this Court were to grant certiorari and hold that his second federal indictment should have been dismissed on speedy trial grounds, he might be able to obtain a dismissal of the state charges against him. The infirmity in that argument, however, is that the Massachusetts rule that petitioner cites applies to dismissals of state prosecutions; petitioner cites no case nor any statutory authority suggesting that a dismissal of a federal prosecution on speedy trial grounds would bar a state prosecution for similar acts. There is therefore no support for petitioner's suggestion that a dismissal of his federal charges on speedy trial grounds would help him in his state case and that this Court should address his federal Speedy Trial Act claim for that reason.

If the government reindicts petitioner and he is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his Speedy Trial Act claim to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, the court of appeals' decision is not ripe for review by this Court.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1988

[2] Because petitioner is not seeking review of a final judgment, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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